Damage to Petitioner's property and investment continued to progressively increase. In 1989 the Crown Hills developers coerced Petitioner to enter into an agreement to have him put a construction lien on his property for the purpose of providing offsite public improvements, i.e. sewer and storm drain for the Crown Hills development. This was two years after approval of TM 4456. This should have been completed or secured for completion in 1987. Petitioner eventually financed an offsite public storm drain designed to serve an immediate benefit for the entirety of the Crown Hills Development plus other developments north of I-8. The only use of this sewer has been by the public.

In light of this coercion and in the absence of a full disclosure of facts, a performance bond was provided, paid for by Crown Hills and the beneficiary was the County of San Diego. Because of Petitioner Shaw's lack of knowledge of the County's mandatory duties attendant to offsite public improvements, necessary eminent domain proceedings, and his ignorance of the existence of the fraudulent map, he took action he believed to be prudent to protect his lifetime investment. Respondent capitalized upon this ignorance and induced the Petitioner into acts that were clearly disadvantageous to his interests.

The Respondent repetitively failed to disclose its obligations for offsite public improvements and the legal redress eminent domain proceedings would have provided to Petitioner. This failure to disclose and subsequent fraudulent concealment of the Respondent's duties induced many of Petitioner's actions taken to protect his property. Petitioner's reliance upon the Respondent was justifiable and their fraud in inducing that reliance should be actionable in a court of law. The Respondent had sufficient knowledge that the sewer did not exist through Petitioner's property. Nonetheless, they allowed the fraudulent map to be used. This action, be it taken through negligence, fraud, or sheer incompetence, constitutes clear culpability in the damage suffered to Petitioner's property.

The actions perpetrated by the Respondent were an expeditious and unlawful way for the them to achieve control of

private land for the purpose of the public improvement in lieu of eminent domain. And the taking of private land for such an improvement is necessarily compensable under federal law.

Petitioner delayed legal action until the final time for performance by the Respondent had passed. The events detailed above make clear the necessary facts Respondent failed to disclose and the substantial damage suffered as a result of nondisclosure. This damage culminated in the final loss and control of Petitioner's property and lifetime investment, in March 2001.

Procedural History

On December 27, 2001 Petitioner filed a tort claim against Respondent, the County of San Diego. (AA 1-2) Petitioner filed the original Complaint for Damages on August 1, 2002. (AA 3-20) and First Amended Complaint on April 29, 2002. Therein the Petitioner raised the inverse condemnation/eminent domain claim. The Respondent County of San Diego answered on September 6, 2002 and May 30, 2003 respectively. (AA, 30-32; AA, 79-81)

Respondent moved for Summary Judgment on the grounds that Petitioner's claim were timed barred under applicable statute of limitations. (AA, 85-106) The Superior Court for the County of San Diego granted the Respondent's motion in an order dated November 4, 2003. (AA, 254-256) Judgement was entered on January 29, 2004. (AA, 265).

Petitioner filed notice of appeal with the Court of Appeals, Fourth Appellate District, Division One, on December 23, 2003. The Court of Appeal affirmed the decision of the lower court in an order dated July 15, 2005. Petitioner filed a petition for rehearing on July 28, 2005 on the grounds of material misstatements of fact, substantive gaps in analysis in the Court of Appeal's opinion, and a failure to properly address the eminent domain argument proffered in the original claim. The petition for rehearing was denied by order dated August 9, 2005. The judgment of the Court of Appeals became final on August 15, 2005. Petitioner filed petition for review in the Supreme Court of the State of California on August 18, 2005. The Supreme Court denied that Petition for Review on October 12, 2005.

REASONS FOR GRANTING THE PETITION

I. THE STATE APPELLATE COURT RULING CONFLICTS WITH DECISIONS OF THIS COURT ON CONSTITUTIONAL TAKINGS THUS NECESSITATING INTERVENTION TO SETTLE AN IMPORTANT FEDERAL QUESTION

Rule 10 of the Rules of the Supreme Court makes clear that review on a writ of certiorari is not a matter of right but rather an exercise of judicial discretion. However, this Court has established, through both practice and policy, a willingness to intervene in instances in which the actions of a state court clearly contradict this Court's prevailing precedent on matters of constitutional significance.

Rule 10(c) addresses this particular ground for the Court's exercise of discretional review, providing for review when "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. (R.10(c), Rules of the Supreme Court).

The actions by the California Court of Appeals clearly derogated from established case law on federal issue of constitutional takings. Petitioner properly raised the takings claim in the state trial court, arguing that the actions of the Respondent constituted an inverse condemnation of his property rights. Once that federal claim has been properly presented, Petitioner may invoke his right to make additional arguments in support of that claim in a petition for writ of certiorari. This Court has made clear that petitioners are not limited to the precise arguments they have made below, but rather may formulate additional arguments in support of a properly raised taking claim. (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78 (1988); *Yee v. City of Escondido*, 503 U.S.519,534 (1992).)

Inverse condemnation is the name given to a cause of

action against a governmental agency to recover the value of the property which has been taken in fact by the governmental agency even though there has been no formal exercise of the power of eminent domain. The Petitioner's inverse condemnation claim falls squarely under the purview of the Takings Clause of the Fifth Amendment.(*Palazzolo v. Rhode Island*, 533 U.S.606, 616 (2001); *Stevens v. City of Cannon Beach*, 510 U.S.1207 (1994).) As the foregoing argument shall attest, the ruling set forth by the state appellate court ignored established constitutional precedent created and maintained to insure that a state may not transform private property into public property without just compensation. (*Palazzolo, supra*, 533 U.S.at 614.)

The Fifth Amendment provides that private property shall not be taken for public use, without just compensation. This provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation. (*Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).)

Governmental action that mandates that some person or persons other than the private property owner receive some or all of the use and enjoyment of the owner's property is categorized as "appropriative" under federal law. Appropriative takings of private property are juxtaposed to "regulatory takings" which, through ordinance and edict, a governmental entity defines or limits the extent to which private property may be used or enjoyed by its owner. These two categorizations of takings form the backbone of traditional Fifth Amendment analysis. Appropriative takings should be and are in fact subject to greater judicial scrutiny in light of the fact that the governmental action extends beyond mere regulation of a private property owner's rights. Instead the government goes one step further to actually transfer those rights.

Endemic in the history of American political theory is the notion that the government is charged with regulative duties. Despite a deep mistrust of centralized government and sovereign autocracy, the Framers acknowledged that certain tasks related to order and efficiency of political and social operations were best given over to the national government and correlative state governments. Accordingly, most purely regulatory governmental actions are rarely considered takings under law. (*United States v. Lynhah,* 188 U.S. 445 (1903); *United States v. Hanter*, 500 F. Supp. 188 (1980).)

However, when the actions of the government seek to redistribute property rights, the eye of the law must squarely and sternly analyze the act. Petitioner acknowledges that mere appropriation of private right is by no means unconstitutional. On the contrary, it is well established that a governmental agency, may in the interests of political economy, economic progressivism, or social advancement take from the private owner to serve another interest. (*Pennsylvania Central Transportation Company v. New York City*, 438 U.S. 104 (1978).) However, such taking, once justified under law must then be justly compensated for, such that the private owner is left with some vestige of a fair deal.

Petitioner asserts that it is this very "fair deal" of which he was deprived. As the foregoing argument sets forth, the actions of the Respondent county agency clearly and conspicuously amounted to an appropriation of a private property right without legal authorization and absent any consideration of the constitutional mandate to compensate Petitioner for this appropriation.

II. THE COUNTY OF SAN DIEGO'S CONDITIONING OF SITE PREPARATION PLAN APPROVAL UPON THE ACCEPTANCE OF EASEMENTS FOR PUBLIC IMPROVEMENTS CONSTITUTES CLEAR GOVERNMENT APPROPRIATION OF PRIVATE PROPERTY RIGHT.

Petitioner made clear in the abbreviated statement of the case that the ultimate result of Respondent's action has been the loss of his lifetime investment. But that loss is not in and of itself the primary focus of this legal claim. Granted, Petitioner has been financially disenfranchised of a profitable piece of property. But more important for this Court is the manner by which that loss came about. The manipulation of governmental authority by the Respondent must be redressed.

The easements for sewer and storm drain construction were made mandatory upon the Petitioner before a site preparation plan approval would be granted. This mandate finds legal support in neither statute nor common law. Rather, the Respondent took advantage of the ignorance of the Petitioner to effectively transfer the responsibility of public improvement financing and construction from the appropriate locus of the State to the inappropriate and inequitable domain of the private citizen.

This writ has mostly narrowed its legal discussion to the issues of eminent domain and appropriative governmental takings. It must be noted for the sake of context that much of the state court proceedings concerned the circumvention by fraud of state subdivision laws attendant to offsite public improvements. Of primary, though by no means exclusive, importance for this Court is the analysis of the mandatory easements levied by the Respondent county agency before consideration and approval of a site preparation plan.

A. <u>The Making Mandatory of Easements for Public Improvement Clearly Amount to a Land Use Control.</u>

Applying the progeny of this Court's analysis in similar takings cases, Petitioner asserts that this mandatory easement requirement amounts to a recognized control of land use and enjoyment. (*Lucas v. South Carolina Coast al,* 120 C. Ed 2d 798 (1992); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).) In effect, the Respondent conditioned the development, use, and enjoyment

of the Petitioner's property upon his acquiescence to easements for public sewer and storm drains. This case presents a separate fact scenario from those instances in which the land use control lies in the language of actual law. (*Lucas v. South Carolina Coast al,* 120 C. Ed 2d 798 (1992).) No where neither in the statutory authority granted to the Respondent county agency nor in the derivative property power held by that agency will one find an authorization for such manipulation of site preparation plan approval. Ultimately, the effect of Respondent's action was to substantially and significantly control the use of a private property owner's land. As such Petitioner's primary argument directs this Court to the policy and precedent of land use jurisprudence.

B. The Making Mandatory of Easements for Public Improvements Does Not Substantially Advance A Legitimate Governmental Interest.

Land use controls constitute clear takings in instances where they do not "substantially advance legitimate governmental interests" or if they deny a property owner "economically viable use of his land." (*Agins v. City of Tiburon*, 447 U.S. 255 (1980).)

The first prong of the Agins test presents two fundamental points for analysis: first, *substantial advancement* and second, *legitimate governmental interest*. Petitioner will readily concede that the actions of the Respondent did substantially advance their intended end: to transfer the financial responsibility for state-financed public improvements to the private property owner. Of some significant difficulty remains the argument that this transfer amounted to a "legitimate government interest." (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).) Petitioner borrows from the Court's own language in *Nollan v. California Coastal Commission*, preferring to classify this government action as neither legitimate nor appropriate, but rather an "out and out plan of extortion." (*Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987).)

Before Petitioner's site preparation plan would be approved, he must acquiesce to the easements for public sewer and storm drains. Without the grant of a site preparation plan, no further development or marketing of Petitioner's property could proceed. Petitioner's only option was to submit to the demand, grant the easement, and which later resulted in Petitioner assuming primary financial responsibility for the construction of a public sewer and storm drain to later be abused.

This first prong of *Agins* addressing whether a land use control substantially advances a legitimate governmental interest was applied in *Nollan*. Therein the Court held that extraction of a public access easement across a strip of beach as a condition for a permit to enlarge a beachfront home did not "substantially advance" the state's legitimate interest in preserving public view of the beach from the street in front of the lot. (*Id.* at 838.) The easement instead was designed to allow the public to walk back and forth along the beach between two public beaches. Therein the Court, after opining on the extortive aspects of the building restriction, proclaimed, "If the government wants an easement across the Nollans' property, it must pay for it." (*Id* at 842; *J.E.D. v California Coastal Commission*, 483 U.S. 825 (1987); *First Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).)

Applying *Nollan* to this case, the law and logic are highly analogous. Here the extraction is for a sewer and storm drain to run through Petitioner's property and serve the entirety of the Crown Hills subdivision and surrounding neighborhood. The legitimate governmental interest, as discussed above, certainly cannot lie in the usurpation of private property rights for the financing of governmental obligations. Of course, the Respondent may assert that the need to create and maintain public sewer and storm drain facilities is prima facie a legitimate governmental interest. To this argument, Petitioner responds in kind with the Court in Nollan, "If the government wants an easement for public sewers and storm drains through Petitioner's property, it must pay for it!"

C. Even Assuming Arguendo That A Substantial Governmental Interest Was Advanced, The Nexus Between That Interest and The Required Easements Lacks the "Rough Proportionality" Required by Law.

Failing to find an "essential nexus" between the permit condition and the claimed governmental interest, the Court in *Nollan* needed not go further to address the impact of such a nexus on an eminent domain claim. Petitioner remains adamant that the required nexus is lacking between the site preparation plan and mandatory easements for public improvements. However, in the interests of full disclosure to the Court, Petitioner draws upon the precedent of *Dollan v. City of Tigard* in analyzing the weight of that nexus should the Court find one to exist. *Dollan* held that the Government must establish a "rough proportionality" between permit conditions and the developmental impact at which they are aimed. (*Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).) Through *Dolan*, this Court established a two tiered analysis attendant to this necessary nexus. Finding the nexus is simply not enough. Rather, the Government must go further to prove this "rough proportionality", a litmus test for reasonableness under the colour of the law.

Petitioner argues that no such "rough proportionality" exists in this case. In levying the burden of public improvements upon the Petitioner before approval of a site preparation plan, Respondent inextricably linked these two disparate acts with neither legal precedent nor public policy to do so.

D. The Making Mandatory of Easements for Public Improvement Effectively Deprived Petitioner of Economically Viable Use of His Land.

The second prong of *Agins* addressing whether or not the land use control deprive the private property owner "economically

viable use of his land" creates a categorical rule that when the owner of real property has been called upon to sacrifice all economical beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. (*Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).)

Here Respondent may argue that Petitioner, upon granting of easements for public improvement, had complete and unfettered ability to develop and market his property. However, the "consent" by Petitioner to these mandatory easements was clearly manufactured and any further development of the property after such manufactured consent can hardly be deemed of the independent free will of the Petitioner. Petitioner points this Court to *Lucas v South Carolina Coastal Council*, which held that the *Agins* "total deprivation" rule did not create an all or nothing situation since the "landowner whose deprivation is one step short of complete" may still be able to recover. (*Id.* at 2895.)

Conjecture abounds on the issue of what action would have been taken by the Respondent had they been unable to manipulate the process of site preparation approval to secure their necessary easements for public improvements. This would have been the proper place for the county agency to instigate eminent domain proceedings, take possession and title of the Petitioner's property to facilitate the necessary offsite improvements for the Crown Hills development, and fairly, justly, and timely compensate Petitioner accordingly. For the law clearly empowers any agency authorized to established sewer and drainage systems to acquire the lands or easements so necessary by purchase, prescription, or eminent domain. (*Wilton v. St. Johns County*, 98 Fla 26 (1928); 25 Am. Jur. 2d Section 29.)

If eminent domain proceedings had been properly initiated, the eventual liens and loss of property would never have occurred. Ultimately, had that action been timely taken as the law so proscribes, the near interminable litigation associated with this case could have been properly avoided, the responsibilities of the Respondent could have been properly met, and the rights of the

Petitioner could have properly protected.

III. THE ASSIGNMENT OF A PRIVATE PROPERTY OWNER'S RIGHT OF USE AND ENJOYMENT TO THE PUBLIC AT LARGE ACTIVATES THE JUST COMPENSATION CLAUSE OF THE 5TH AMENDMENT.

Private property taken without just compensation violates the Due Process Clause of the 14th Amendment. (*Chicago, Burlington, and Quincy Railroad v. Chicago*, 166 U.S. 226, 241 (1897).) Explicit in the just compensation clause of the Fifth Amendment is the requirement that the taking of private property be for public use. (*Bradley v. Fallbrook Irrigation*, 164 U.S. 112 (1896). The modern conception of public use equates it with the police power in furtherance of the public interest. (*Berman v. Parker*, 348 U.S. 26 (1954).) Courts have long recognized the power of eminent domain as merely a means to an end. Yet jurists and philosophers alike question the means by which our ends are met. It remains a far more facile task to concoct the perfect end, a quasi-utopian objective with which few can find fault. Yet the means by which we seek this end and the lengths to which we go to assure its fulfillment will be the living testament of our Law.

A. The Mandatory Easements Designated for Public Improvements Disproportionately Burdened the Petitioner's Private Property Rights.

In *Berman v. Parker*, the Court opined on the notion of a public good, stating, "the concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." (*Berman v. Parker*, 348 U.S. 26, 32-33 (1954).) And of course correlative to this protection and promotion of the public good is the reality that some shall enjoy more of the benefit while others suffer more of the burden. For

legislation designed to promote the general welfare commonly burdens some more than others. (*Pennsylvania Central Transportation Company v. City of New York*, 438 U.S. 104, 133 (1978).)

And so on the face of things perhaps the public good has been so served. A sewer and storm drain now service the needs of a community and the public at large benefits. But we ask the Court, at what cost? What is to stop a governmental agency from going further in displacing upon the private citizen obligations it ought and must under law meet? Should the good of the public be so broadly construed so as to permit the unfettered circumvention of Law and usurpation of private Right? This subtle manipulation of site preparation plan policy and approval processes served as the catalyst for the eventual disintegration of one property owner's lifetime investment. This is inexcusable when clear jurisprudence and established procedure exists for a governmental agency to properly procure the very same rights in the subject property that they obtained through willful fraud and recklessness.

For the aim of the takings clause is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. (*Armstrong v. United States*, 364 U.S. 40, 49 (1959); *Eastern Enterprises v. Apfel*, 118 S.Ct 2131 (1998).) In keeping with Justice O'Conner's logic, the Petitioner was wrongly forced to bear alone the public burden of improvements intended, designed, and ultimately functioning for the general public. At the turn of the twentieth century, this Court recognized that "no man's property can be constitutionally taken from him without his consent and transferred to certain other men for their use, however numerous they may be."The mandatory easements levied upon Petitioner by the county governmental agency were yet another medium by which the Respondent circumvented the law. These easements forcibly assumed by the Petitioner should have been and were legally entitled to compensation under Eminent Domain. (*Panhandle Eastern Pipe Line Company v. State Highway Commission*, 294 U.S. 613 (1935).)

Where there exists an easement over, upon, or below a parcel of land taken for the public use, the easement is considered to be property for purposes of constitutional analysis and the owner of such easement is entitled to compensation. (*Panhandle Eastern Pipe Line Company v. State Highway Commission*, 294 U.S. 613 (1935); *United States v. Twin Power Company*, 350 U.S. 222 (1956).) This analysis remains important for the Petitioner's factual argument that the Respondent had numerous opportunities to secure rights to this property under eminent domain. Even after wrongfully inducing the Petitioner to grant these easements for the public improvements, the Respondent could have then instigated eminent domain proceedings to simultaneously secure their right to the necessary offsite sewer and storm drain and protect Petitioner's economic interest in the subject property. Instead Respondent took advantage of the opportunity to levy the full force of the economic burden of these offsite public improvements upon Petitioner.

B. The Mandatory Easements for Sewer and Storm Drain Construction Cleary Amount to a Sufficient Public Advantage, Convenience, and Benefit such to Qualify as Takings for the Public Use.

In analyzing the requirement of "public use", courts have traditionally employed either an actual public use or general public benefit analysis. (*Thorton Development Authority v. Upah*, 640 F. Supp. 1071 (1986).) Actual public use requires a duty on the person or agency appropriating the property to provide the public with the use intended and a correlative right conferred upon the public to so use that property. (*Rudee Inlet Authority v. Bastian*, 206 Va 906 (1966).)

Alternatively, public benefit analysis looks to the uses which benefit the general welfare of the entire community in order to constitute a public use. In this manner, public is interpreted to mean public advantage, convenience or benefit. (*Harmon v.*

Phillips Petroleum Company, 555 F. Supp. 447 (1982); *Dyer v. Texas Electric Service*, 680 S.W. 2d 883 (1985).)

Petitioner directs this Court to the public benefit analysis, highlighting the general public good served by the construction and maintenance of proper sewer and storm drain facilities. Of course this Court has rejected any literalist interpretation that every appropriated property must be put into use by the general public. (*Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243 (1984).) Instead, relevant law separates takings claims into separable classifications. Applicable for our analysis here is the classification of public use takings as those takings which enable the federal Government, state government, or subsidiary agency thereof to execute its public functions and conserve the health and safety of the public. (*United States v. Welch*, 217 U.S. 333 (1910).) In so concurring that the mandatory easements for clear public improvement amounted to an appropriative taking for public use, this Court should require that just compensation be provided to the Petitioner.

C. Petitioner Is Entitled to Timely Fair Market Value of the Property Under Appropriate Application of the Just Compensation Clause of 5th Amendment.

The just compensation required by the Constitution is that which amounts to a "full and perfect equivalent for the property taken." (*Monongahela Navigation v United States*, 148 U.S. 312, 326 (1893).) The aegis of this analysis is the owner's loss not the taker's gain, a measure of compensation rightly focused on the rights of the deprived interest rather than that of the realized interest. (*TVA v. Powelson*, 319 U.S. 266, 281 (1943); *Roberts v. New York City*, 295 U.S. 264 (1935).)

Pursuant to *United States v. Miller* and its subsequent progeny, the general standard is the market value of the property. In certain instances, fair market value is unascertainable and alternate calculations must be considered. However, in this

instance, the fair market value of the Petitioner's property is readily discernable. (*United States v. Miller*, 317 U.S. 369 (1943).)

IV. A STATUTE OF LIMITATIONS DEFENSE SHOULD NOT SURVIVE FEDERAL APPELLATE REVIEW IN INSTANCES WHERE THE PROCEDURALLY-BARRED PARTY CAN PROVE FRAUDULENT CONCEALMENT INDUCED THEIR DELAY IN BRINGING SUIT.

Statutes of limitation are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation. (*Order R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).)

A. The Statute of Limitations Defense Demands Timely Suit of Discoverable Wrongs.

Statutes of limitations encourage an equitable and expeditious resolution to legal disputes. With their historical roots in ancient Roman law, these limitations were first enacted to regulate the manner in which real property could be recovered. Early English common-law courts placed no time limitations on causes of action, believing this to be the prerogative of the King or of Parliament. The modern era of statutes of limitations did not begin until the Limitations Act of 1623. This statute, promulgated under the reign of James I, "provided specific lengths of time for numerous real property and personal actions. American jurisprudence on statute of limitations traces its historical antecedents to these common law traditions.

This Court has repetitively acknowledged that statutes of limitation are not only vital to the welfare of society but moreover

favored in the law. They promote repose, stimulate activity, and punish negligence. Petitioner makes no attempt to repudiate these fundamental principles. Rather, we direct the Court to the very practice and policy of sound statute of limitations analysis.

Our modern American statutes of limitations serve two primary purposes in concocting the often artificial time restraints for the initiation of formal legal action for a perceived grievance: first, a "substantive" purpose in granting repose to defendants and second, a "procedural" purpose in encouraging plaintiffs to bring suit in a timely manner. (*Sun Oil Co. v. Wortman*, 486 U.S. 717, 736 (1988) *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).)

Inextricably intertwined with sound statute of limitations application are the edicts of equity. Concerns for equity remain inherent in the federal common law defenses to a statute of limitations claim. (*Continental Potash, Inc. v.Freeport -McMoran*, Inc., 858 P.2d 66, 77 (1993). For equity preserves what procedure may sacrifice.

B. Federal Common Law Demands That the Statute of Limitations Be Tolled When a Party Asserting Such an Affirmative Defense Utilizes Fraudulent Concealment to Procure the Delay.

The essence of the equitable defense can be found in the doctrine of fraudulent concealment. Fraudulent concealment is designed to estop defendants from asserting that the cause of action is barred when the defendant himself is responsible for the plaintiff's failure to bring suit. (*Resolution Trust Corp. v. Scaletty*, No. 72, 230; *Litman v. Prudential-Bache Properties*;) Be it through fraud, negligence, or deceit, a party illegally induces a delay which proves to be the dispositive factor in the dismissal of a case. Equity seeks to revive these claims, resurrecting the spirit of the Law and the substance of the suit.

The Respondent fraudulently concealed its obligations under state statute and federal Constitution. The factual predicate

to this claim lies in the circumvention of duties attendant to offsite public improvements under the California Subdivision Map Act and the resulting constitutional violations from the Respondent's failure to implement proper eminent domain proceedings to legally secure title and possession to Petitioner's property.

The California Subdivision Map Act expressly provides that if public improvements, required by the county as conditions to tentative map approval, have not been completed at the time of final map approval, the legislative body must require, as a condition to approval of the final map, the subdivider either to complete the improvements at the subdivider's expense or to initiate and consummate proceedings under an appropriate assessment act of the Mello-Roos Community Facilities Act of 1982 (CAL GOV'T CODE §53311-53368.3) for the financing and completion of all required improvements. (CAL GOV'T CODE § 66462). The public improvements at issue in this case are a sewer and storm drain, created through a unit easement, designed to benefit the entirety of the Crown Hills Subdivision and neighboring properties thereto.

Rather than exercising its legal right to commandeer the Petitioner's property for the necessary public improvements, Respondent chose instead to fraudulently conceal material facts to the Petitioner. Admittedly, eminent domain jurisprudence rests upon a foundation of public right. And Petitioner does not dispute that the law affords agents and agencies of the state a power to dispossess the private owner of his property at will or whim. But what is maintained in the law is an obligation attendant to that right to compensate the owner fairly and promptly for his loss and to carry out functions timely with full disclosure. Neither California statute nor federal Constitution condone the fraudulent concealment of an agency's legal obligation to both service the public and protect the private citizen. When the interests of these two collide, the governmental agency is not to trample upon the private citizen, manufacturing consent from an amalgam of ignorance and fear.

This is the sum and substance of the Respondent's acts

over the course of the past twenty years. What began with mandatory easements for the approval of site preparation plans was perpetuated through a fraudulent map that grossly misrepresented structures that plainly did not exist at the date of the map's approval. The Petitioner, through the making mandatory of easements for public sewer and storm drain prior to site preparation plan approval, financed public improvements that themselves were the proper purview of an eminent domain action. Rather than initiate eminent domain proceedings over the Petitioner's property to build and maintain the public sewer and storm drain, Respondent chose instead to fraudulent conceal material facts and affirmative obligations that would have alerted Petitioner to his legal rights under constitutional law.

Ultimately, Petitioner discovered these legal rights through his own research and when suit was brought to hold accountable the county agency, that agency asserted a statute of limitations defense. After inducing the Petitioner's delay, Respondent thereafter had the audacity to rely upon that very delay in denying its own culpability for the eventual economic and pecuniary losses of the Petitioner.

This Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party (*Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).)

Petitioner urges this Court, in keeping with common law and federal precedent, to strike down the Statute of Limitations defense proffered by the Respondent on the grounds that it violates the equitable principles that a procedural defense may not be predicated upon an act of willful and fraudulent concealment of facts.

C. The Federal Common Law "Discovery Rule" Demands That the Statute of Limitations Be Tolled When The Plaintiff Is Excusably Unaware of an Inherently Unknowable Injury.

The "discovery rule" operates as a parallel principle to fraudulent concealment in the equitable defense to a statute of limitations claim. While fraudulent concealment focuses upon the conduct of the defendant, the discovery rule focuses on the unfairness to the plaintiff of barring a cause of action when the harm is inherently unknowable. (*O'Brien v. Eli Lilly & Co.*, 668 F. 2d 704, 705 (1981). The discovery rule came to be through as courts realized that equity demanded greater reasonableness in evaluating the rationale behind the untimely suit, courts redefined the cause of the action to include "discovery" as a prerequisite to accrual. (*Kohler v. Woollen, Brown & Hawkins,* 304 N.E. 2d 677 (1973). The Court in *Kohler* noted that it was "manifestly unrealistic and unfair to bar a negligently injured party's cause of action before he has had an opportunity to discover it exists." (*Id.* at 680.)

In applying the discovery rule, a cause of action will accrue when the diligent plaintiff has sufficient knowledge of the facts to put him on notice of the invasion of his legal rights." (*United States v. Kubrick*, 444 U.S. 111, 126 (1979).) This standard activates the statute of limitations when the plaintiff knows, or reasonably should know: (1) that he has been injured *and* (2) that his injury has been caused by another party's conduct. [emphasis added] (*Cathcart v. Keene Industrial Insulation*, 471 A.2d 493, 500 (1984).)

Petitioner was excusably ignorant that the actions mandated by the County of San Diego were not in fact directed toward the preservation of his property interest but rather designed to deprive him of that property right. The Respondent induced the very delay in Petitioner filing suit. That ultimate delay rendered Petitioner's claim time-barred under the three year statute of limitations analysis. Had Petitioner been aware that his property

interest was being systematically extinguished and actions made mandatory upon him would actually incumbent upon the local governmental agency itself, he would have brought suit in a timely fashion. Petitioner argues for the ear of this Court to insure proper review of these equitable defenses of fraudulent concealment and delayed discovery to the repeatedly invoked statute of limitations claim erroneously accepted by the state tribunals.

D. In Instances Where A State Court Fails to Rule on The Applicable Law of Delayed Accrual Which Would Have Properly Tolled The Statute of Limitations, This Court May Exercise Its Discretion to Do So Sua Sponte.

The delayed accrual principle is based on the notion that statute of limitations are intended to run against those who fail to exercise reasonable care in the protection and enforcement of their rights. (*Saliter v. Pierce Brothers Mortuaries* 81 Cal.App3d 292, 297 (1978).) Petitioner acted well within the bounds of reasonableness in attempting to secure proper completion of the subdivider improvements. However, these acts were not obligated by statute or regulation. Rather, it was the local governmental agency who possessed the legal duty to compel completion of the off-site improvements. California courts have long given the "plaintiff, in cases where a continuing duty has been breached, the option of filing suit when the time for complete performance has passed." (*Lambert v. Commonwealth Land Title Insurance Company* 53 Cal.3d 1072, 1078 (1991); *Israelsky, supra*, 212 Cal.App.3d at 617-618; 3 WITKIN, CAL.PROC., ACTIONS, §622.) That standard, when applied to the case at bar, lodges not only the dispositive date of final damage at the final time after which performance could not longer be made, i.e. the date of Appellant's loss of control and interest in the property. In so lodging the dispositive date in 2001, this suit survives all Statute of Limitations attacks proffered by the Respondent and ultimately condoned by the State of California judicial system.

Petitioner reminds this Court that neither the Appellate nor Supreme Court of California addressed the principle of delayed accrual. In light of the fact that the Appellate Court's decision rested largely on a procedural statute of limitations analysis, failure to address a fundamental defense to that time bar is inexcusable. Petitioner invokes the logic of this Court to grant him the respect of full and fair review of applicable law before condoning the eradication of his property interest in violation of constitutional principle and policy.

V. AGENCY LAW IMPUTES A CONSTITUTIONAL VIOLATION OF A LOCAL AGENCY TO ITS PARENT STATE WHEN THAT AGENCY IS CREATED BY, EMPOWERED THROUGH, OBLIGATED TO THAT STATE.

The foundation of a governmental system predicated upon the principles of Federalism requires a division of power and distribution of obligation between the levels of government. State and federal governments derive their power from different sources and depend upon the full functioning relationship between themselves to make, enforce, and interpret law. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority, to punish such offenses, and in so doing to exercise its own sovereignty and not that of the other. (*United States v. Lanza*, 260 U.S. 377, 382 (1922).)

While the Supremacy Clause of the United States operates to pre-empt conflicting state law with the applicable federal principle, it remains the State's own sense of sovereignty from which its powers are borne. (*United States v. Wheeler*, 435 U.S. 313, 320 (1978).) The Founders of our Nation were adamant in their distrust of centralized governance. It was these fears that manifested in the creation of strong and sovereign state within the greater federal Union.

The philosophical and political undertones of our Government bear reiteration before this Court as Petitioner brings

suit against the local agencies charged with the power and obligation delegated to it by the State of California. For while the power of the State is borne of sovereign right, the power of the city or of the county exists only by virtue of the will of the State. Cities and counties [sic] are not sovereign entities. (*United States v. Wheeler*, 435 U.S. at 313.)

A. The County of San Diego Is a Subordinate Governmental Entity to the State of California.

Political subdivisions of the State – counties and cities – never were and never have been considered as sovereign entities. Rather they have been traditionally regarded as *subordinate governmental instrumentalities* created by the State to assist in carrying out state governmental functions. (*Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *United States v. Wheeler*, 435 U.S. at 320.)

The State lacks the sheer resource of time and authority to oversee the entirety of its populace and territory. Efficient and effective governance requires the delegation of power to subordinate organizations with the understanding that those organizations operate in the name of the State and serve in a limited capacity as a surrogate for that State. Their creation is one of convenience not of right and the powers conferred to them may be abridged through right or will of their creator, the State.

As the Court posited in *Hunter v. City of Pittsburgh*, these governmental units (cities and counties) are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them and the number, nature and duration of the powers rests in the absolute discretion of the State. (*Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).) Petitioner implores this Court, in acknowledgment of the aforementioned principles, to review the code and conduct of the Respondent County of San Diego in light of its legal subordinance to the State of California.

State law represents the will of the people of a State.

When such a law expressly empowers a local agency to act on behalf of the State in ensuring compliance to that State law, any violation by the local instrumentality should be reviewed with the highest degree of judicial scrutiny. Likewise, federal law binds the State to comport with Constitutional mandates. When the actions of a State or a subsidiary agency thereof transgress the constitutional rights of its citizens, American jurisprudence provides remedy and relief through the federal courts.

B. The Powers Delegated to the County of San Diego Are Entirely Derivative from the Powers of the State of California.

The notion of local power when contemplated in the minds of jurists is often characterized as paradoxical at best. While local agencies are not impotent in their daily affairs and management opportunities, their express powers derive from the state. States also enjoy near complete hegemony over local governments. Under both federal and state constitutional law, local governments have no rights against their states. Localities may not assert the contracts clause, equal protection clause, or privileges and immunities clause against their state governments. (*City of Trenton v. New Jersey* 262 U.S. 182, 188 (1923); *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923); *Williams v Mayor of Baltimore* (1933) 289 U.S. 36, 40.)

Therefore a local government is a delegate of the state, possessing only those powers the state has chosen to confer upon it. (*Plat v. San Francisco* 158 Cal. 74, 82 (1910).) All local powers must have their origin in a grant by the State. *(West Coast Advertising Co. v. San Francisco*, 14 Cal. 2d 516, 524 (1939).)

C. Any Violation of a Legal Obligation Owed by an Agent of the State Is Tantamount to a Violation by the State Itself.

Local government is an agent of the State, exercising

limited powers at the local level on behalf of that State. (*Williams v. Eggleston*, 170 U.S. 304 (1898).) When an agent violates a duty imposed by law, that violation must be scrutinized with the same vigour as if the principal committed the violation itself. The acts of the agency are to be binding upon on his principal. This legal relationship exists to insure that a principal not insulate itself from liability through mere delegation of duty. Of course, when an agent deviates from their direct grant of authority under law, the principal can not in good faith be held liable for those extenuating acts.

In addressing the agency relationship created between the Respondent County and the State of California, Petitioner directs this Court to the traditional measure for determining the scope of local power under a state statute. Under Dillon's Rule, local governments may exercise only those powers "granted in express words" or those "necessarily implied or incident to" the powers expressly granted in the law itself. (*Bedford v. Raytheon Co.*, 755 F. Supp. 469 (1991); Gerald E. Frug, *The City as A Legal Concept*, 93 Harv. L. Rev. 1057, 1109-15 (1980).) Dillon's rule operates as a canon of construction and rule of limited power. It reflects the view that local governments are agents of the state by requiring that all local power be traced back to a specific delegation. Whenever it is uncertain whether a locality should possess a certain power, the court should assume the locality lacks that power. (*Id.* at 1122.)

In analyzing the actions committed by the Respondent County, Petitioner asserts that means implemented by the Respondent to circumvent their constitutional requirements under the 5th and 14th Amendments and statutory requirements under California subdivision law amount to an illegal and inappropriate extenuation of their delegated power.

No where in constitutional or statutory law is there a power created by the federal government, conferred to the State of California, and delegated to a local agency to approve a map that the agency either willfully or negligently knows to be false.

No where in constitutional or statutory law is there a power created by the federal government, conferred to the State

of California, and delegated to the local agency to make mandatory the easements for public improvements as a condition for site preparation plan approval.

No where in constitutional or statutory law is there a power created by the federal government, conferred to the State of California and delegated to the local agency to wield its knowledge of state requirements for public improvements as a weapon against the private landowner ignorant of these obligations.

No where in constitutional or statutory law is there a power created by the federal government, conferred to the State of California, and delegated to the local agency to circumvent its obligation to exercise eminent domain proceedings and provide just compensation to a private owner for his dispossession and loss.

The acts committed by the Respondent COUNTY not only distort the purpose behind such constitutional and statutory law but also tear asunder the principle of the agency relationship itself. The State of California has been poorly served by the acts of its agent, the County of San Diego. Petitioner implores this Court to rejuvenate the rule of law that keeps clear the limited scope of a local government's power and authority.

VI. THE DUE PROCESS REQUIREMENTS OF THE 14th AMENDMENT INVALIDATE A GRANT OF SUMMARY JUDGMENT WHEN ACCEPTED WITHOUT PROPER JUDICIAL SCRUTINY OF CONSTITUTIONAL LAW, STATUTORY REVIEW, OR TRIAL PROCEDURE.

The Fourteenth Amendment to the United States Constitution provides that a state shall not deprive any person of life, liberty, or property, without due process of law. (US Const. Amend. XIV) Those who seek to invoke its procedural protection must establish that one of these interests is at stake. The safeguards of the Fourteenth Amendment serve to protect the private citizen against capricious actions by the instruments of the State.

Here Petitioner asserts that the purview of that protection ought to extend equally into the judicial as well as legislative and executive arms of the State. (*Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 893 (1991).) Petitioner's deprivation was the result of a capricious Court whose haste to dispense with the suit at hand came at the cost of sound judicial review. The legal arguments of Petitioner's case were largely ignored by each judicial panel. No court deemed it necessary to address Petitioner's defense to the affirmative statute of limitations claim that was to be the foundation for the original grant of summary judgement and subsequent affirmances thereto. Without proper judicial review of this procedural bar, Petitioner was denied his legal right to contest the deprivation of his property, a right fundamentally protected by the Fourteenth Amendment to the United States Constitution.

A. The Court of Appeals Failed to Address the Affirmative Defense Proffered by the Petitioner to the Statute of Limitations Claim Argued by the Respondent and Accepted by the Trial Court.

The Court of Appeal's opinion never addressed Petitioner's argument that the statute of limitations defense raised by Respondent could be satisfactorily survived through a proper application of the principles of delayed accrual and equitable tolling. (See Argument III, *supra.*) In so doing, they deprived the Petitioner of his constitutional protected right to judicial review. In fact the state appellate court acknowledged this gross oversight in the very text of their opinion.

> We recognize that the trial court based its ruling on the statute of limitations. However, the parties have not presented us with an adequate record or briefing to allow us to understand the timing ... and thus we do not reach the issue of whether the statute of limitations bars

Shaw's causes of action ... Instead we affirm the summary judgment on other grounds supported by the record. (Shaw, supra at 17.)

B. The Court of Appeals Predicated an Incomplete and Inaccurate Decision upon Material Misstatements of Facts.

These so-called "other grounds" which formed the basis for the state appellate court's ruling to affirm the grant of summary judgment were predicated upon material misstatements of facts. The most egregious of these misstatements hereto follows.

1. Court of Appeal wrongly maintained Appellant held primary responsibility for sewer and storm drain development.

The Court of Appeal opinion stated, "In February 1989 Shaw entered into an agreement for improvements with the County in which he promised to dedicate part of his land for a pubic road and to build, at his own expense, various improvements on his property, including a drainage system and a 10 inch sewer main." (Ct. App. Op., 2) This is a clear misstatement of fact and legal obligation. The only reason Appellant entered into 1989 agreement was due to the failure of the subdivision and Respondent to comply with state law in 1986 regarding offsite public improvements. These improvements should have been completed under California Subdivision Map Act § 66462 in 1986. These improvements were in fact the easements, made mandatory by the County, which should have been previously completed in order for subdivision to be in compliance with California Subdivision Map Act requiring completion or security of offsite public improvements before final map approval.

2. Court of Appeal inaccurately dated approval of Map TM4456.

The Court of Appeal opinion stated, " The tentative map No. 4456, approved in 1984, failed to identify any offsite improvements necessary for the subdivision sewer or flood control system." (Ct. App. Op., 3) This date referenced by the Court is inaccurate. The map approval date was 1987, not 1984. This date is material in light of the fact that the Appellant argues that the reason why this map "failed to identify any offsite improvements necessary for the subdivision sewer or flood control system" was because a fraudulent map was being used. This map was used to fraudulently convey the idea that the necessary gap to be bridged between public sewer and subdivision was only to Appellant Shaw's property and NOT to Interstate 8.

CONCLUSION

The power of eminent domain exists to insure that the fragile balance between the rights of the individual and the duties of the State be preserved. In the eyes of some it is a "despotic power", a vestige of both Grotius' inquires on natural law and Locke's philosophical predilections toward democratic governance. But its power, when wielded for good and according to the edicts of the law, can both sustain a sovereign state and protect a private populace.

Petitioner calls upon this Court to acknowledge the failure of the Respondent to use appropriately its grant of power under the Fifth Amendment. For the reasons so stated and argued above, the Respondent's actions amount to an appropriative governmental taking entitling the Petitioner to constitutionally secured just compensation.

The petition for writ of certiorari should be granted.

1 February 2006

Walter M. Shaw

APPENDIX A

Grant of Extension of Time to File Petition of Writ of Certiorari

(Reformatted)

Supreme Court of the United States

Office of the Clerk

Washington, DC 20543-0001

William K. Suter

Clerk of the Court

(202) 479-3011

January 9, 2006

Mr. Walter Shaw

4000 Palm Avenue

Bonita, CA 91902-2520

Re: Walter M. Shaw
v. County of San Diego, California
Application No. 05A613

Dear Mr. Shaw:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice O'Conner, who on January 9, 2006 extended the time to and including February 9, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by s:_____

Sandy Spagnolo

Case Analyst

APPENDIX B

Decision of State Court of Appeals
(Reformatted)

WALTER M. SHAW, Plaintiff and Appellant, v. COUNTY OF SAN DIEGO, Defendant and Respondent.

D043509

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

July 15, 2005, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of San Diego County, No. GIE13476. Lillian Y. Lim, Judge.

DISPOSITION: Affirmed.

JUDGES: IRION, J.; BENKE, Acting P.J., NARES, J. concurred.

OPINION BY: IRION

OPINION: Plaintiff Walter M. Shaw appeals a summary judgment entered in favor of the County of San Diego (the County) on his claims for breach of a mandatory duty under Government Code section 815.6, negligence, inverse condemnation, and breach of contract. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Shaw purchased unimproved land in Alpine, California, for eventual commercial or industrial development. An adjacent landowner-developer, Cal West Alpine Associates (Cal West), hoped to develop its property into a 300-home subdivision to be called Crown Hills. Both landowners began development efforts in the mid-1980's.

In 1986 Shaw sought to make [*2] his raw land suitable for development by applying for a grading and building permit from the County. The County required Shaw to grant a sewer easement to the Alpine Sanitation District and a drainage easement to the County of San Diego Flood Control District as a permit condition. Before it would issue a building permit, the County also required Shaw to agree to construct various improvements on his property and post improvement bonds (the Bonds). Consequently, in February 1989 Shaw entered into an agreement for improvements with the County in which he promised to dedicate part of his land for a public road and to build, at his own expense, various improvements on his property, including a drainage system and a 10-inch sewer main (hereafter "agreement for improvements"). The County informed Shaw that he would not be responsible for maintenance or repair of the improvements because, upon completion, the County would accept dedication. After the agreement for improvements was signed, the County issued Shaw grading and improvement permits.

During this same time period, Cal West was undergoing the planning and approval process for its Crown Hills subdivision. Part of that process included [*3] approval by the County's Board of Supervisors of the tentative and final subdivision maps. The tentative map No. 4456, approved in 1984, failed to identify any offsite improvements necessary for the subdivision sewer or flood control systems.

Apparently, during the development approval process, Cal West decided that it wanted to connect its subdivision sewer line to the trunk line by constructing a sewer line over property owned by Shaw and another adjoining landowner, Thomas Dyke. In 1986 Cal

West and Shaw entered into a joint venture agreement which provided that the parties desired to construct a sewer and storm drain along and over Shaw's property for their mutual benefit. The final map No. 4456-1 approved by the County's Board of Supervisors reflected a sewer line crossing Shaw's property.

In March 1989, one month after Shaw was issued grading and building permits, Cal West, Shaw and Dyke entered into a development and easement agreement for grading and construction of the sewer line on Shaw's and Dyke's properties. Under that agreement, Dyke, also a contractor, would grade Shaw's land, Shaw would pay for the grading, and Cal West would install and pay for all other improvements [*4] Shaw had promised the County, including the drainage system and sewer main. Pursuant to the agreement, Cal West also provided the Bonds in which Cal West, as principal, and a surety company pledged to be "firmly bound unto the County of San Diego, State of California."

Dyke and Cal West performed the agreed-upon work on Shaw's property. However, the grading and improvements planned for Shaw's property were never satisfactorily completed and the County refused to approve the work. Because the work was not approved, the County refused to accept dedication of the improvements.

In February 1995 Shaw sued Dyke, alleging the grading performed by Dyke was not properly performed. Dyke counter-sued for payment. A jury awarded Dyke more than $ 2 million. In September 1998, when Dyke sought to execute against the property, Shaw filed for bankruptcy. The bankruptcy proceeding was dismissed in January 2000. Shaw then agreed to pay Dyke $ 2 million on or before January 5, 2001 or, failing that, to forfeit the property.

In 2000 Shaw sought to have the County arrange for the completion of drainage and grading improvements on his land, either by enforcing the Bonds against Cal West or by dedicating [*5] the storm drain and sewer line to public use. The County did not enforce the Bonds nor did it accept dedication of the storm drain and sewer line.

Shaw attempted to sell the property in 2000 and 2001, but discovered that without correction of the storm drain problem, he would be able to sell the property for only $ 1 million instead of its estimated full commercial value of $ 3.5 million to $ 4 million. Unable to sell the property or obtain financing, Shaw transferred the property to Dyke by grant deed on January 12, 2001, as required by his agreement with Dyke.

On December 27, 2001, Shaw filed a government tort claim against the County in which he contended that the County failed to perform mandatory duties imposed by the Subdivision Map Act n1 and the County of San Diego Code of Regulatory Ordinances.

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n1 Government Code sections 66410 to 66499.58.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

On August 1, 2002, Shaw filed a complaint for damages against the County. The complaint included causes of action [*6] for breach of a mandatory duty under Government Code section 815.6, negligence and inverse condemnation. A first amended complaint was filed on April 29, 2003. It added a breach of contract cause of action. All four causes of action in Shaw's first amended complaint were based on the County's failure to enforce the Bonds to secure completion of the improvements on Shaw's property. The County answered the first amended complaint on May 30, 2003.

After discovery, the County moved for summary judgment, arguing that none of Shaw's causes of action had merit and that each was barred by the applicable statute of limitations. In its November 4, 2003 decision, the trial court granted the County's summary judgment motion based on the conclusion that all of Shaw's claims were barred by the statute of limitations. n2 The trial court also stated that the Bonds were not for the benefit of persons in Shaw's position and that Shaw was not a third party beneficiary of the bonding agreement between Cal West and the County. Shaw filed his notice of appeal on December 23, 2003. Judgment was entered on January 29, 2004. We treat Shaw's

notice of appeal as an appeal from the later [*7] entered judgment. (Contreras v. Anderson (1997) 59 Cal.App.4th 188, 194, fn. 5.)

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n2 Shaw claims on appeal that the trial court should not have granted the County's motion for summary judgment without additional discovery. Shaw waived his right to conduct further discovery by failing to request a continuance to conduct further discovery before the court ruled on the motion for summary judgment. (Lewinter v. Genmar Industries, Inc. (1994) 26 Cal.App.4th 1214, 1224.)

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

STANDARD OF REVIEW Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established. (Code Civ. Proc., § 437c [*8] , subd. (p)(2); see also Romano v. Rockwell Internat., Inc. (1996) 14 Cal.4th 479, 486-487.) Once the moving party defendant meets its burden, the burden shifts to the plaintiff to show a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2).) On appeal, we exercise our independent judgment, deciding whether undisputed facts have been established that negate the opposing party's claim or state a complete defense. (Romano, supra, at pp. 486-487.) In so doing, we strictly construe the papers of the moving party and liberally construe those of the opposing party, resolving any evidentiary doubts or ambiguities in favor of the party opposing the motion. (Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 768.)

We may uphold the trial court's grant of summary judgment on any theory. (Western Mutual Ins. Co. v. Yamamoto (1994) 29 Cal.App.4th 1474, 1481 ["where there is no genuine issue of material fact, the appellate court should affirm the judgment of the trial court if it is correct on any theory of law

applicable to the case, including but not limited to the [*9] theory adopted by the trial court"].)

As we shall explain, the County established a prima facie case for summary judgment by demonstrating that as to each of Shaw's causes of action, Shaw could not establish one of the elements of the cause of action or that there was a complete defense to the action. Shaw failed to show the existence of any triable issue of material fact to preclude summary judgment.

DISCUSSION

Cause of Action for Violation of Mandatory Duty Under Government Code Section 815.6

We first examine the cause of action for "Violation of Mandatory Duty Under Government Code [section] 815.6." Shaw alleges the County had a mandatory obligation to enforce the Bonds to compel completion of the grading and improvements pursuant to Government Code sections 66499 through 66499.10, and County of San Diego Code of Regulatory Ordinances (SDCRO) sections 81.403.1, 81.406, and former sections 87.208 and 88.306. He further alleges that these provisions were enacted to protect against the type of injury and damages he suffered and that by failing to perform its [*10] mandatory duties under these statutes, the County violated Government Code section 815.6.

Except as otherwise provided by statute, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or public employee. (Gov. Code, § 815.) Government Code section 815.6 provides for liability for injury proximately caused by a public entity's failure to discharge a mandatory duty imposed by an enactment. We use a three-part test to determine whether a public entity may be held liable under Government Code section 815.6: (1) the enactment must impose an "obligatory" function, rather than describing a "merely discretionary or permissive" course of action; (2) the enactment must be "designed" to protect against the type of injury suffered; and (3) breach of the mandatory duty must be the proximate cause of the injury suffered. (Haggis v. City of Los Angeles (2000) 22 Cal.4th 490, 498-499.) As we explain below, we affirm the trial court's

ruling in favor of the County on the mandatory duty cause of action because the undisputed [*11] facts establish that at least two of these necessary elements are not present.

First, none of the enactments cited by Shaw impose a mandatory duty on the County to enforce the Bonds. "To construe a statute as imposing a mandatory duty, the mandatory nature of the duty must be phrased in explicit and forceful language." (Quackenbush v. Superior Court (1997) 57 Cal.App.4th 660, 663.) However, "even where language in the predicate enactment appears mandatory, if significant discretion is required to carry out any duty imposed, that duty is not mandatory within the meaning of section 815.6 and thus a breach of the duty will not support tort liability." (Sutherland v. City of Fort Bragg (2000) 86 Cal.App.4th 13, 20.) Whether an enactment creates a mandatory duty is a question of law. (Haggis v. City of Los Angeles, supra, 22 Cal.4th 490, 499.)

During the relevant time period, SDCRO former sections 87.208 and 88.306 gave the County discretion to decide whether to enforce the Bonds, stating that if work is not completed, a County official "may order such work as in his opinion is necessary." (SDCRO former §§ 87.208, subd. [*12] (d), 88.306, subd. (f), italics added.) n3 SDCRO section 87.304, effective May 9, 2003, provides similar discretionary language: "In the event of failure to complete the work, . . . the County Official may cause to be performed such work as in his opinion is necessary to correct such deficiencies." (Id., subd. (e), italics added.) The other provisions cited by Shaw - Government Code sections 66499.1 through 66499.10, and SDCRO sections 81.403.1 and 81.406 - do not address the County's purported obligation to enforce the Bonds. (See Gov. Code, §§ 66499.1-66499.10 [addressing improvement security under the Subdivision Map Act]; n4 SDCRO § 81.403.1 [addressing extensions of time for a subdivider to construct required public improvements]; SDCRO § 81.406 [addressing the amount of security required when a subdivider enters into an agreement to construct required improvements].) Thus, none of the enactments cited by Shaw impose a mandatory duty on the County to enforce the Bonds to secure completion of the storm drain, and

the first element required for liability under [*13] Government Code section 815.6 is not present. n5

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 SDCRO former section 87.208 was repealed May 9, 2003. Prior to repeal, subdivision (d) provided: "In the event of failure to complete the work or failure to comply with all of the conditions and terms of the grading permit, the County Official may order such work as in his opinion is necessary to correct any deficiencies or eliminate any dangerous condition and leave the site in a safe condition or may order the work authorized by the permit to be completed to a safe and stable condition to his satisfaction. . . ."

SDCRO former section 88.306 was repealed May 9, 2003. Prior to repeal, subdivision (f) provided: "In the event of failure to complete the work, or failure to comply with all terms and conditions of the permit, the Director may order such work as in his opinion is necessary to eliminate any dangerous condition and to leave the site in a safe condition, or may order that the work authorized by the permit be completed to a safe condition, to his satisfaction. . . ."

SDCRO section 87.304, effective May 9, 2003, provides: "In the event of failure to complete the work, failure to comply with any of the conditions or terms of the grading permit or this Division or other ordinances, or when necessary to eliminate any hazardous or dangerous condition, the County Official may cause to be performed such work as in his opinion is necessary to correct such deficiencies. . . ." (Id., subd. (e).)

Under either version of the SDCRO, our analysis is the same. [*14]

n4 Government Code sections 66499.1 and 66499.2 dictate the required forms of performance bonds, and bonds for security of laborers and materialmen. Sections 66499.3 and 66499.4 specify the required amounts of bonds to guarantee the performance of any act or agreement. Section 66499.5 discusses reduction of bond by reason of other bonds furnished. Section 66499.6 provides that bonds "shall be a trust fund to guarantee performance and shall not be subject to enforcement of a money judgment by any creditors of the depositor." Sections 66499.7 and 66499.8 detail when security

provided by a subdivider shall be released. Section 66499.9 limits liability upon a bond given for the faithful performance of any act. Section 66499.10 discusses the proper defendants in suits brought by contractors and subcontractors to recover amounts due to them.

n5 Citing additional statutory bases for his claims, Shaw argues for the first time on appeal that the County violated the Subdivision Map Act by fraudulently approving tentative map No. 4456 in 1987. According to Shaw, the map was fraudulent because it shows an existing sewer line across Shaw's property when in fact that sewer line did not exist. Shaw also argues for the first time on appeal that the County violated the Subdivision Map Act by not requiring sewer and storm lines to be constructed on his property as offsite improvements or by not requiring security for construction of such lines to have been in place when tentative map No. 4456 was approved. However, Shaw did not plead a cause of action based on these allegations. Since these claims were not pled in the trial court, we do not consider them for the first time on appeal. (United States Golf Assn. v. Arroyo Software Corp. (1999) 69 Cal.App.4th 607, 623 ["appellant cannot challenge a judgment on the basis of a new cause of action it did not advance below"].)

We note, however, that any claims Shaw attempted to plead based on the Subdivision Map Act would likely be barred by the 90-day statute of limitations of Government Code section 66499.37, which states: "Any action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations . " - - - - - - - - - - End Footnotes- - - - - - - - - - - - - [*15]

Second, liability under Government Code section 815.6

requires Shaw to establish that his injury is ""one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty."" (Haggis v. City of Los Angeles, supra, 22 Cal.4th 490, 499.) It is not enough that an enactment "'confers some benefit'" on the class to which plaintiff belongs. (Ibid.) Moreover, a benefit that is "'incidental'" to the enactment's protective purpose cannot serve as a predicate for liability. (Ibid.)

Here, the statutory enactments requiring the Bonds were not intended to protect Shaw as the property owner. (See Morro Palisades Co. v. Hartford Accident & Indemnity Co. (1959) 52 Cal.2d 397, 401-402 ["the right to recover under the bond appears clearly to be a right of the county rather than of the owner of a portion of the property which might be affected by the default. . . . It is the county which is indemnified by the express terms of the bond against loss" which "may thus be likened to faithful performance bonds required by statute from contractors on state public works . . . and on county [*16] building contracts," citations omitted].) Rather, the purpose of requiring the Bonds was to protect the County and the public, not Shaw as a property owner. (County of Yuba v. Central Valley Nat. Bank, Inc. (1971) 20 Cal. App. 3d 109, 112, 97 Cal. Rptr. 369 ["purpose for requiring security for street improvement work is to ensure faithful performance of a subdivider's obligation to place streets in a proper condition for use by the public"].) Moreover, even had the County looked to the bonding agreement to complete the grading and improvements on Shaw's land, Shaw remained liable for the cost thereof under both the agreement for improvements ("Shaw [the developer] will cause to be constructed . . . at his sole cost and expense") and SDCRO section 87.304, subdivision (f) ("Use of the security or a portion thereof shall in no way limit or release the obligation of the permittee to satisfy the full cost of completing the work or correcting any deficiency, hazard, or injury created by the work"). Thus, Shaw also cannot establish the second required element for liability under section 815.6.

Based on the above, we affirm the ruling in favor of the County on the cause [*17] of action for violation of a mandatory

duty. n6

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 We recognize that the trial court based its ruling on the statute of limitations. However, the parties have not presented us with an adequate record or briefing to allow us to understand the timing of when the County refused to enforce the Bonds or when Shaw should have understood this fact, and thus we do not reach the issue of whether the statute of limitations bars Shaw's causes of action to the extent that they are premised on his claim that the County failed to enforce the Bonds. Instead we affirm the summary judgment on other grounds supported by the record.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

II

Negligence Cause of Action

Next, we examine Shaw's cause of action for negligence. Shaw alleged the County owed him a duty "to exercise due care in the acceptance, administration, and public acknowledgment of the efficacy of the Bonds" due to the "special relationship" of the parties, which the County breached by failing to initiate any steps to mandate completion of the drainage and [*18] grading improvements on Shaw's property. We affirm the summary judgment on the negligence cause of action because Shaw has not identified an actionable basis for government tort liability based on a negligence theory.

All tort liability against a government entity must be based on statute. (Gov. Code, § 815; Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal.3d 780, 785, fn. 2, 221 Cal. Rptr. 840; Duarte v. City of San Jose (1980) 100 Cal. App. 3d 648, 653, 161 Cal. Rptr. 140.) Thus, Shaw cannot assert a common law negligence claim against the County. Apart from Government Code section 815.6 and all of the other statutory provisions and ordinances that Shaw cites in support of this cause of action, which we have already discussed and rejected above, Shaw has not identified any other statute that could possibly provide a basis for the government tort liability in this case under a negligence theory.

Shaw pleads a special relationship with the County, apparently invoking the concept that a government entity may have a duty to provide assistance when the plaintiff has a special relationship with [*19] a government employee. (See Ronald S. v. County of San Diego (1993) 16 Cal.App.4th 887, 891-892, fn. 1; see also City of Santee v. County of San Diego (1989) 211 Cal. App. 3d 1006, 1012, 259 Cal. Rptr. 757.) However, Shaw has not expanded on this theory in his appellate briefing and thus has cited no authority establishing that the facts of this case gave rise to any such special relationship. (See People v. Stanley (1995) 10 Cal.4th 764, 793 [court may decline to consider an argument made without citation to authorities]; People v. Hardy (1992) 2 Cal.4th 86, 150 [declining to address issue presented by appellant without "either argument or citation to relevant authority"].) Moreover, as the County points out, Shaw did not even address the negligence claim in his briefing to the trial court, and thus presented no such basis for his negligence claim there either. Thus, we affirm the trial court's ruling on the negligence cause of action.

III

Cause of Action for Breach of Contract/Breach of Duty to Third Party Beneficiary

Shaw's next cause of action attempts to assert a claim based on contract law [*20] theories. The basis for Shaw's cause of action for "Breach of Contract/Breach of Duty to Third Party Beneficiary" is not completely clear. What is clear, however, is the nature of the obligation that he alleges the County breached. Shaw asserts the County breached its contractual obligation by "failing to properly supervise and inspect the progress of [the projects], failing to enforce completion of the project under the security provided in the performance bonds, and thereafter refusing to accept dedication of the project." As we explain, we perceive no tenable basis for Shaw's breach of contract claim because Shaw has not identified any contractual basis for any of the obligations that he claims were breached by the County.

First, Shaw may be attempting to base his claim on the February 1989 agreement for improvements that he entered into

with the County. However, nothing in that agreement can even remotely be interpreted to obligate the County to supervise and inspect the progress of the work, to enforce completion of the project, or to accept dedication of the project. Instead, the agreement for improvements merely creates a series of obligations on the part of Shaw related [*21] to his plans, with the consent of the County, to develop the property.

Second, to the extent that Shaw is attempting to base his breach of contract claim on the bonding agreement between Cal West and the County, we reject that claim because Shaw has not established he was a third party beneficiary of the Bonds. The rights and liabilities under a surety bond are determined from the language of the bond read in light of applicable statutes. (Morro Palisades Co. v. Hartford Accident & Indemnity Co., supra, 52 Cal.2d 397, 400.) The Bonds supplied by Cal West provided that Cal West, as principal, and the surety company were "bound unto the County of San Diego" to pay on condition that the improvements were not completed to the County's satisfaction. The language of the Bonds indisputably identifies them as being directed toward the County, with no indication of Shaw as a third party beneficiary. As we discussed above in rejecting the claim for breach of mandatory duty, Shaw has not identified any statutory authority showing that the Bonds were designed to protect him from the injury he claims.

Relying on Walton v. Eu (1983) 143 Cal. App. 3d 403, 191 Cal. Rptr. 779, [*22] Shaw argues that by accepting the Bonds from Cal West, the County transformed itself into a surety and Shaw into a beneficiary. Walton does not apply here because it dealt with a specific statutory provision that made the plaintiff a potential beneficiary of the surety deposit at issue in that case, which was held by the Secretary of State. (Id. at pp. 405-406.) Here, no statute or ordinance specifies that the Bonds were for the benefit of the property owner. n7 Thus, nothing in Walton supports Shaw's claim to be a third party beneficiary of the Bonds.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n7 To the extent Shaw is alleging a claim for breach of contract

based on the County's issuance of either the grading permit or the improvement permit, we conclude that such a claim fails as a matter of law because a permit is not a contract. (Tognoli v. Taroli (1954) 127 Cal. App. 2d 426, 428 [distinguishing contract from a license or permit]; US Ecology, Inc. v. State of California (2001) 92 Cal.App.4th 113, 128-129 [rejecting argument that license gave rise to contractual rights].)

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*23]

For these reasons, we affirm the ruling in favor of the County on the cause of action for breach of contract/breach of duty to third party beneficiary.

IV

Cause of Action for Inverse Condemnation

Shaw's final cause of action is for inverse condemnation. Shaw alleges the County took his property by requiring the construction of various public improvements on his property that were for the benefit of the entire community and then refusing to enforce the Bonds or to take steps necessary to compel completion of the public improvements.

Inverse condemnation is a legal mechanism for enforcing the constitutional rule that private property may not be taken or damaged for public use without just compensation. (San Diego Gas & Electric Co. v. Superior Ct. (1996) 13 Cal.4th 893, 939.) "'In an inverse condemnation action, the property owner must first clear the hurdle of establishing that the public entity has, in fact, taken [or damaged] his or her property . . . .'" (Id. at p. 940.)

Shaw clarified at the summary judgment hearing that his "inverse condemnation claim is predicated on the breach of contract." According to Shaw, "until there [*24] was a breach of contract [to enforce completion of project,] the County hasn't committed an act which would rise to a level of cross [sic] condemnation." As we concluded above, the County was not contractually obligated or otherwise legally mandated to enforce the Bonds or to compel completion of the drainage system or

sewer line on Shaw's property. Therefore, the County's failure to enforce the Bonds could not have given rise to a claim for inverse condemnation under Shaw's theory.

As an additional basis for his inverse condemnation claim, Shaw also appears to be claiming that the County took or damaged his property by requiring him (1) to grant sewage and drainage easements to the Alpine Sanitation District and San Diego County Flood Control District, and (2) by requiring him to install sewage and drainage lines on his property, as memorialized in the agreement for improvements. To the extent Shaw is attempting to make any such claims, they are barred by the statute of limitations.

"Generally, an inverse condemnation action that is based upon 'damage' to property must be filed within three years of discovery of the damage. [Citation.] Actions based upon a 'taking' of [*25] property generally must be filed within five years of the taking." (Patrick Media Group, Inc. v. California Coastal Com. (1992) 9 Cal.App.4th 592, 607.) Shaw did not file his tort claim against the County until December 27, 2001, and did not file his original complaint until August 1, 2002. Regarding Shaw's claim based on the sewage and drainage easements, even assuming the lengthier five-year limitations period based on a taking rather than mere damage to the property, Shaw's claim was at least 15 years late because Shaw granted the last of the sewage and drainage easements in November 1986. Similarly, assuming the applicability of the five-year statute of limitations, Shaw's claim based upon the County's requirement that he install sewage and drainage lines on his property is time-barred. The agreement for improvements was signed in 1989; Shaw did not file his complaint until 2002 -12 years after the statute ran.

Based on this analysis, we affirm the trial court's ruling in favor of the County on the inverse condemnation cause of action.

CONCLUSION

For all of the reasons set forth above, we conclude that the County has demonstrated that one or more elements [*26] of each of Shaw's causes of action cannot be established and - in the case of the portion of the inverse condemnation claim barred by the

statute of limitations - that the County has established a complete defense. We thus affirm the trial court's order granting summary judgment in favor of the County

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P.J.

NARES, J.

APPENDIX C

Decision of State Trial Court
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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

FILED *(stamp)*
Clerk of the Superior Court
NOV 04 2003
By: M. Aguilar, Deputy
EAST COUNTY DIVISION

Number	GIE013476
Hearing Date	11/04/03
Dept.	15
Judge	HON.

Plaintiff	WALTER M. SHAW
Defendant	COUNTY OF SAN DIEGO
Attorney for Plaintiff	PETER G. FRIESEN
Attorney for Defendant	C. ELLEN PELSECKER

DECISION ON SUBMITTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Having taken the matter under submission following oral argument and the lodgment of Plaintiff's Claim against the County of San Diego", Defendant's Motion for Summary Judgment is GRANTED.

The first issue is whether the cause of action pled are barred by the applicable limitations periods. Plaintiff's first cause of action is for violation of a mandatory duty under Government Code section 815.6. The limitations period for an action of liability created by statute is 3 years. (CCP section 338(a).) The second cause of action is for negligent omissions related to bonds to compel

performance of improvements resulting in, as pled, diminishment in the value and marketability of plaintiff's property. The limitations period for dimunition in value of real property is 3 years. 4th Edition, Witkin, California Procedure, Actions, section 556, pages 709-710 and cases cited therein. The third cause of action for inverse condemnation alleging diminished value of property, associated damages in attempts to compel performance of the subject improvement and to compel performance by the defendant County to enforce bonds, which were security for performance of subject improvements. The limitations period for such an action is 3 years. (Id.) The fourth cause of action is for breach of contract. The limitations period for breach of contract is 4 years. (CCP 337(1).)

Plaintiff argues the damage and dimunition in value is so great tha his property was "take" and the 5 year limitation period applicable to condemnation actions applies. Plaintiff has not pled his First Amended Complaint nor has he shown, by way of evidence in response to this motion that a "taking" has occurred. This is not a case where plaintiff has been dispossessed of real property by the defendant or where defendant has damaged Plaintiff's title. See Hensler v. City of Glendale (1994) 8 Cal.4th 1, 23-24 and cases cited. Accordingly, the applicable limitations periods are 3 years and 4 years.

The initial Complaint in this case was filed on August 1, 2002. The initial claim to the County was filed on December 27, 2001, which described the factual basis underlying the Claim. Defendant suggests the period of delay should be measured from the date of discovery of harm to the date the complaint was filed as it relates to any recovery not based on a tort cause of action. Plaintiff urges the time period is measured from that point in time when defendant last breached its continuing obligation toa ct as surety of the construction project. Accrual of each non-contract cause of action would, in normal course, have to occur after July 31, 1999 to survive a limitations challenge or if based on contract, after July 31, 1998. Plaintiff acknowledged he became aware of the defect in the installation of the storm drain in January of 1998. He acknowledges he understood repair required its removal and

replacements about a year later., presumably January of 1999 (without citation to the record). According to Ken Discenza (Declaration in Opposition), he was retained by Plaintiff to evaluate the status of the work performed on the development of his property, visited the site in December of 1997, and observed the material for the storm drain was corrugated metal pipe, rather than reinforced concrete with portions already damaged and crushed by rock fill in violation of the permitted plan. According to plaintiff (Declaration in Opposition), he contacted the Chief Engineer of th County of Department of Public Works about the defects in February 1998 and arranged for an inspection. After that inspection h3e explored different ways to fix the problem and after a period of "over a year" learned the cost of repair would be more than one million dollars. He also learned of impact upon the value of his property when he attempted to finance repayment of its indebtedness in February 2000. (The cited portions of plaintiff's Declaration are somewhat unclear on this point.)

Plaintiff urged that damages for defendant's failure to enforce bonds, which were security for performance of the subject improvements, had not stabilized until apparently September 2000 when financing on the property was denied (without citation to the record) and therefore the causes of action for purposes inverse condemnation had not accrued. He cites Aaron v. City of Los Angeles (1974) 40 Cal.App.3d 471 (there is a page cite error in the pleadings.) However, the Court in Aaron was looking at a case involving changing levels of annoyance from airplane overflights, some of which must be borne without compensation and a factual scenario where a taking only occurs after an evaluation of such factors as the frequency and level of flights, the type of planes, the accompanying effects, the reasonable reactions of the humans below, etc. (Id. at 491-492.) In that context, the COurt was referring to the accrual of a cause of action dependent somewhat on that point in time when the injury causing situation had stabilized - not accrual of an action based on the ascertainment of a fixed figure for damages. Smart v. City of Los Angeles (1980) 112 Cal.App.3d 232, also cited by plaintiff, is also distinguishable from the instant case in the sense that airplane over flights caused no actual interference in the use and enjoyment of a vacant parcel of

land and so no damage occurred until the property owner discovered lenders had redlined the property. (Id. At 238-239.)

The general rule is that accrual of the cause of action and the running of the a statue of limitations is deferred until damage occurs. Applying that general rule here, plaintiff was on notice that defendant had breached what plaintiff characterizes as defendant's mandatory duty, implied contractual terms and duty to compel performance of bonds at least as early as February 1998 and the inspection by the Chief Engineer. Each cause of action is therefore barred by the applicable limitations period unless this Court finds the COunty's obligations were continuous in the same sense as an insurer's duty to defend is continuous. (Israelsky v. Title Ins. Co. (1989) 121 Cal. App. 3d 611, 616 - cited by plaintiff) and additionally finds that this continuous duty was one owed to plaintiff. If the duty is considered continuous, plaintiff contends the accrual of his causes of action did not arise until March 2001, the date he lost all rights to his property. In Walton v. Eu (1983) 143 Cal.App.3d 403, plaintiffs were treated as third party beneficiaries of a statutory bond deposited by a discount buying organization with the defendants Secretary of State and the State of California. The statutes governing the deposit of cash or the maintenance of the bond provided the bond was for the benefit of any person "who is damaged by any violation of [title 2.6] or by fraud or dishonesty or failure" of the discount buying organization to meet its contractual obligations. Id. at 406. The defendants in Walton v. Eu were held bound by the principles of law applicable to sureties, which were implicated by the statutory scheme regulating discount-buying businesses. In the case at bar, there is no declaration of legislative intent that the bonds at issue in this case were for the benefit of persons in Plaintiff Shaw's position. The Court agrees with defendant County of San Diego that the bond posted as part of the permit process between Shaw and defendant County was not legislatively intended to protect plaintiff or to create a surety relationship between him and the defendant. If it were, an affirmative declaration of the same would be part of the legislative enactment as in Walton v. Eu, supra.

Plaintiff contends he should be treated as a third party

beneficiary of a contractual relationship between the Crown Hills developer and the County of San Diego. This Court, for the reasons just stated, does not find the permit and inspection process between Crown Hills and the defendant created an implied and continuous duty as a surety to protect plaintiff's interests. Nor does this Court find that the deficiencies in the storm drain passing through plaintiff's property was part of a public project serving the Crown Hills development. The facts presented do not support plaintiff's claim.

For all the foregoing reasons, the defendant's motion for summary judgment is granted.

Dated: 11/04/03

s: Lillian Y. Lim
Judge of the Superior Court

APPENDIX D

Decision of State Supreme Court Denying Review
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Court of Appeal, Fourth Appellate District, Division One
- No. DO43509
S136623

IN THE SUPREME COURT OF CALIFORNIA
En Banc

WALTER M. SHAW, Plaintiff and Appellant

v.

COUNTY OF SAN DIEGO, Defendant and Respondent

Petition for review DENIED.

Stamp
SUPREME COURT
FILED
OCT 12 2005
Frederick K. Ohirich Clerk

Deputy

GEORGE

Chief Justice

APPENDIX E

Petition for Review, State Supreme Court
(Reformatted)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

WALTER M. SHAW,

Petitioner and Appellant,

v.

COUNTY OF SAN DIEGO,

Defendant and Respondent

Case No. _____

(4th Civil No. D043509)

(San Diego Superior Court

Case No. GIE 13476)

After a Decision by the Court of Appeal

Fourth Appellate District

Division One

Case No. D043509

On Appeal from the Superior Court of the County of San Diego,

The Honorable Lillian Y. Lim, Judge

Case No. GIE 13476

PETITION FOR REVIEW

Walter M. Shaw
4000 Palm Drive
Bonita, CA 91902-2520
(619) 472 - 1555
Appellant in Propia Persona

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

WALTER M. SHAW,

Petitioner and Appellant,

v.

COUNTY OF SAN DIEGO,

Defendant and Respondent

Case No. _____

(4th Civil No. D043509)

(San Diego Superior Court Case No. GIE 13476)

After a Decision by the Court of Appeal

Fourth Appellate District

Division One

Case No. D043509

On Appeal from the Superior Court of the County of San Diego,

The Honorable Lillian Y. Lim, Judge

Case No. GIE 13476

PETITION FOR REVIEW

TO: THE HONORABLE CHIEF JUSTICE OF THE STATE OF CALIFORNIA AND ASSOCIATE JUSTICES OF THE SUPREME COURT

Appellant WALTER M. SHAW, respectfully requests that the Court grant the petitioner a hearing before the State of California Supreme Court.

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ISSUES PRESENTED

I. Whether a local governmental agency's failure to comply with the California Subdivision Map Act constitutes an actionable legal offense?

II. Whether the creation and approval of a fraudulent map amounts to an illegal circumvention of the California Subdivision Map Act?

III. Whether the concealment of facts related to a subdivision development involving the protection and welfare of an adjacent property owner to that subdivision violates the obligation to disclose material facts under California law?

IV. Whether a local governmental agency's requirement of mandatory easements for public improvements as a condition for an adjacent property owner's site preparation plan approval qualifies as a constitutional taking under law?

V. Whether a local governmental agency's failure to comply with requirements of a State of California Department of Transportation encroachment permit subjects that agency to liability under California law?

VI. Whether a local governmental agency can be held liable for a failure to tender a performance bond when the tendering of that bond would have mitigated damages suffered by an adjacent property owner as a direct result of that agency's failure to adequately comply with their mandatory duties attendant to offsite public improvements under California subdivision law?

VII. Whether a judgment when predicated upon a statute of limitations procedural bar can be properly affirmed by a Court of Appeal's opinion that failed to address the principle of delayed accrual?

VIII. Whether law and equity permit a statute of limitations defense to be affirmed in instances where the actions of the party asserting that defense induced the delay?

INTRODUCTION

California Rules of Court, Rule 28(b) sets forth the grounds according to which the Supreme Court shall grant review of a Court of Appeal decision.

> The Supreme Court may order review of a Court of Appeal decision: (1) when necessary to secure uniformity of decision or to settle an important question of law, (2) when the Court of Appeal lacked jurisdiction, (3) when the Court of Appeal decision lacked the concurrence of sufficient qualified justices, or (4) for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order. Cal. Rules of Ct.,Rule 28 (b).

Appellant lodges this petition for review on the grounds set forth in subsection (1) of the aforementioned rule. The essence of this case lies in the plain language and clear principles of the California Subdivision Map Act. Appellant requests review by this Court in order to settle the important question of how this specific state law is to be appropriately interpreted and effectively enforced in the day to day operations of land development and management.

Throughout the procedural history of this case, Appellant's repeated emphasis on the mandatory duties incumbent upon local agencies under the California Subdivision Map Act have been largely ignored. Appellant's first legal document, the Original claim, stated in clear and concise terms, his complaint against the Respondent, the County of San Diego: "a failure of San Diego County employees to perform Mandatory Duty TM4456-1 of compliance with San Diego County Code and California Subdivision Map Act . . ." (AA, 3)

The California Subdivision Map Act has served as the foundation for Appellant's legal argument in both the Trial Court and Court of Appeals. (AA, 3; AOB, 1, 23ff) However, in ruling against Appellant, the Trial Court refused to address the specific language of the law itself. Instead, that Court predicated its decision on a statute of limitations procedural bar to Appellant's

cause of action. (AA, 265) Saddled with this ruling, Appellant appealed to the Fourth District, arguing that the recognized jurisprudence of delayed accrual and the tangential theories of equitable tolling and equitable estoppel provided sufficient shelter from a statute of limitations attack. (AOB, 37-40; ARB, 12-15) Again, Appellant's arguments on the mandatory duties incumbent upon local government under the California Subdivision Map Act were largely ignored in the Court of Appeal's ruling. (Ct. App. Op., 10) In addition, that opinion offered no significant response to the Appellant's primary theory of delayed accrual. (Ct. App. Op., 12, 16-17) Most importantly, the Court of Appeal opinion contained numerous material misstatements of fact. (Ct. App. Op., 2-5; Appellant Pet. Reh'g, 2-5) These inaccuracies in understanding the facts of this case clearly distorted the judicial understanding and analysis of the claim at hand. Appellant's attempt to secure a rehearing for clarification of the facts and proper application of law was denied. (Appellant Pet. Rehr'g Den.)

Therefore, now frustrated by the failure of two Court's to squarely address his substantive claims, Appellant brings this petition to the California Supreme Court to settle the important question of how to enforce the California Subdivision Map Act's requirements attendant to offsite public improvements in instances where the governmental agency has manufactured compliance with those requirements through a fraudulent concealment of facts and a willful circumvention of duties.

The factual history which follows, in as abbreviated a form as is possible, details the pertinent facts of Appellant's 20 year struggle to vindicate his rights and restore proper legal accountability to the governmental agencies involved in this case. The issues and introduction presented above represent the interaction of California State law and county ordinance. In any conflict existing between these two sources of law, Appellant need not remind this Court that State law preempts local ordinance. Appellant strongly believes that the Supreme Court for the State of California should intervene and allow this case to proceed in order to establish order from chaos and send a firm message that the edicts of State law are to be strictly followed by local county and

city agencies.

The law and logic of the California Subdivision Map Act have been poorly served by the gross dereliction of duty exhibited in this case. Appellant as well has been poorly served, his rights disrespected and his ignorance of the law manipulated by a bureaucracy bent on blind expediency. In addition, the 333 units of the Crown Hills subdivision have been poorly served, their record of title clearly clouded by a failure to timely complete offsite public improvements while representing that those offsite public improvements have been satisfactorily completed.

Finally, Appellant reiterates the magnitude of the public policies and legal principles endemic to this particular case. California state law deserves and demands the respect of local county and city government. A local governmental agency's failure to strictly comply with state law is objectionable on its face. However, when that agency goes further to manufacture compliance through fraud and the manipulation of a private citizen's ignorance as to the obligations the agency holds, the offense is repugnant to essence of law itself. If allowed to go unpunished, these offenses eradicate the trust and legitimacy of the institutions of government. A court, of any level, when presented with evidence of these offenses, cannot and should not, in good conscience, ignore it. In closing, this case stems from a grant of summary judgment and Appellant strongly believes that the interests of the Law demands a full and proper trial on the merits.

Therefore Appellant respectfully requests the Supreme Court exercise its discretional authority to intervene in this case and in so doing vindicate the legal principle, antediluvian as some may see it, that we remain, a government of laws and not of men.

FACTUAL AND PROCEDURAL HISTORY

Facts

This case is about a failure to disclose important facts to a private landowner regarding state law which would have benefitted that private landowner . The Respondent, County of San Diego (Hereinafter, "RESPONDENT") circumvented their duties

attendant to offsite public improvements related to a 333 housing subdivision and failed to comply with the California Subdivision Map Act. This case is about Crown Hills Subdivision TM4456 requiring offsite public improvements from somewhere. This case is about a fraudulent map used to deceive and meant to be a means of circumvention of state law. (Exhibit 20, Map 33 of 44) The County had used the fraudulent map of 1985 which claimed a sewer existed across Appellant Walter S. Shaw's (Hereinafter, "APPELLANT") property to circumvent California law and give the appearance of full compliance. Thus, this case is about the deception and concealment of facts to a landowner to induce him to alter his position of risk and the necessary liability for the damages that result.

The heart of the case lies in the initial stages of the development of Crown Hills, a neighboring property to the Appellants. The Environmental Impact Report for Crown Hills made clear the task at hand: construct a proper sewer system for the 333 unit development. The initial problem described in that EIR was to bring the closest existing public sewer over 1000 feet north beneath Interstate 8 to the boundary of the subdivision. The initial site was east of Tavern Road Bridge. The Subdivision planned this as a route to bridge the "gap". This was the route originally submitted for EIR approval. This route was never used for unknown reasons. However by this route a large portion of the 333 housing unit sewer drainage would require service by a pump. This extension of the public sewer line under I-8 to the Crown Hills subdivision never occurred as described above. Instead they changed their plans and by a fraudulent map were able to circumvent the California Subdivision Map Act requirements.

About two years after the above project started, Appellant began to create a site preparation plan for the purpose of marketing Appellant's property. Prior to approval of that site preparation plan, the County required the establishment of certain public easements through Appellant's property. These public easements were mandatory before site preparation plan approval and were executed in 1986. (Exhibit 36 and 39) These easements were clearly dated 1986. The fraudulent map showing the pre-

existing sewer was clearly dated 1985. This pre-existing sewer neither existed in 1985 nor in 1987 when subdivision map was approved.

Easements for storm drain and sanitation sewer consisting of a unit easement of 40 feet wide by 600 feet long were required by the County Public Works before site preparation plan approval. All communication by Appellant was with the map approval staff of the County of San Diego and not with any official from the individual agencies of Flood Control or Sanitation.

This case is also about CalTrans requiring that the improvements across Dr. Shaw's property be public. The requirements of CalTrans in exchange for encroachment on a state right of way for the off-site public improvement was that the improvements be public, owned and maintained by the respective sanitation district. Appellant's site preparation plans were approved in 1986 including grant of easements through the center of Appellant's property: 40' by 600' for public storm drain and sewer. No compliance with these CalTrans requirements has been made to date.

The subdivision and the Respondent created a fraudulent map in 1985 to circumvent the Subdivision Map Act. They did this in order to obliterate their requirements to create or secure proper offsite public improvements for the subdivision. This fraudulent map was submitted representing a pre-existing sewer and constituted their means of solving the problem of bridging the gap between the closest existing public sewer south of Interstate 8 and the subdivision. This map represented that they would connect to an "existing sewer line" on Appellant's property that plainly did not exist. Appellant was neither notified of this change nor made aware of the fraudulently drawn sewer across his property until his own discovery in 2001.

This map was merely one of means used to circumvent Respondent's obligations under California law. In subdivision cases dealing with offsite public improvements, there is an affirmative obligation to insure completion of that offsite improvement or facilitate financial assurance of that completion prior to final

approval of subdivision Map. (CAL. GOV'T CODE §66462, "State of California Subdivision Map Act") A subdivision has no right to map approval in the absence of the completion of offsite public improvements or the creation of security for those improvements. However, if after 120 days, the County has not forced compliance with this law by the subdivision, that obligation reverts back to the governmental agency to assume responsibility for the completion or security of the offsite public improvements. (CAL. GOV'T CODE §66462.5)

Damage to Appellant's property and investment continued to progressively increase. In 1989 the Crown Hills developers coerced Appellant to enter into an agreement to have him put a construction lien on his property for the purpose of providing offsite public improvements, i.e. sewer and storm drain for the Crown Hills development. This was two years after approval of TM 4456. This should have been completed or secured for completion in 1987. Appellant essentially financed an offsite public storm drain designed to serve an immediate benefit for the entirety of the Crown Hills Development plus other developments north of I-8. The only use of this sewer has been by the public.

In light of this coercion and in the absence of a full disclosure of facts, a performance bond was provided, paid for by Crown Hills and the beneficiary was the County of San Diego. Because of Appellant Shaw's lack of knowledge of the County's mandatory duties attendant to offsite public improvements and his ignorance of the existence of the fraudulent map, he took action he believed to be prudent to protect his lifetime investment. Respondent capitalized upon this ignorance and induced the Appellant into acts that were clearly disadvantageous to his interests.

It should be noted however, that the Respondent, while still not in compliance with the Subdivision Map Act, could have mitigated Appellant's damage had they tendered this performance bond. It was Appellant's belief that the Respondent would tender the bond and Appellant would be able to partially salvage his lifetime investment. Yet the Respondent refused to tender this

performance bond. This exacerbated the already continuous and ongoing economic damage to Appellant's lifetime investment.

The Respondent repetitively failed to disclose its obligations for offsite public improvements. This failure to disclose and subsequent fraudulent concealment of the Respondent's duties induced many of Appellant's actions taken to protect his property. Appellant's reliance upon the Respondent was justifiable and their fraud in inducing that reliance should be actionable in a court of law. The Respondent had sufficient knowledge that the sewer did not exist through Appellant's property. Nonetheless, they allowed the fraudulent map to be used. This action, be it taken through negligence, fraud, or sheer incompetence, constitutes clear culpability in the damage suffered to Appellant's property.

The agreements of 1986, 1988, and 1989 were all against state law and policy. These agreements were merely an expeditious and unlawful way for the Respondent to achieve control of private land for the purpose of the public improvement in lieu of eminent domain. And the taking of private land for such an improvement is necessarily compensable under state and federal law. Appellant delayed legal action until the final time for performance by the Respondent had passed. The events detailed above make clear the necessary facts Respondent failed to disclose and the substantial damage suffered as a result of nondisclosure. This damage culminated in the final loss and control of Appellant's property and lifetime investment, in March 2001.

Procedural History

On December 27, 2001 Appellant filed a tort claim against Respondent, the County of San Diego. (AA 1-2) Appellant filed the original Complaint for Damages on August 1, 2002. (AA 3-20) and First Amended Complaint on April 29, 2002. The Respondent County of San Diego answered on September 6, 2002 and May 30, 2003 respectively. (AA, 30-32; AA, 79-81)

Respondent moved for Summary Judgment on the grounds that Appellant's claim were timed barred under applicable statute of limitations. (AA, 85-106) The Superior Court for the County of San Diego granted the Respondent's motion in an order dated

November 4, 2003. (AA, 254-256) Judgement was entered on January 29, 2004. (AA, 265).

Appellant filed notice of appeal with the Court of Appeals, Fourth Appellate District, Division One, on December 23, 2003. The Court of Appeal affirmed the decision of the lower court in an order dated July 15, 2005. Appellant filed a petition for rehearing on July 28, 2005 on the grounds of material misstatements of fact and substantive gaps in analysis in the Court of Appeal's opinion. The petition for rehearing was denied by order dated August 9, 2005. The judgment of the Court of Appeals became final on August 15, 2005. Appellant filed petition for review in the Supreme Court of the State of California on August 18, 2005.

The Court of Appeal's Decision

The Court of Appeal, Fourth Appellate District, Division One affirmed the decision of the Superior Court for the County of San Diego on all grounds. The Court found that the Respondent had established a prima facie case for summary judgment by demonstrating that either Appellant could not establish one of the elements of the cause of action or that a complete defense existed. (Ct. App. Op., 6) The Court of Appeals concurred with the arguments proffered by the Respondent that the statute of limitations acted as a procedural bar to Appellant's claims. However, it should be noted here again, as it was in the Appellant's Petition for Rehearing, that the Court of Appeals opinion, in so affirming Respondent's procedural bar, offered no response to Appellant's primary affirmative claim of delayed accrual and predicated its rule and rationale on an analysis of the individual bonds rather than the substantive legal claims brought by Appellant under the California Subdivision Map Act.

LEGAL DISCUSSION

I. REVIEW IS APPROPRIATE TO SETTLE AN IMPORTANT QUESTION OF CALIFORNIA LAW IN LIGHT OF THE COURT OF APPEAL'S FAILURE TO ADEQUATELY ADDRESS OR APPROPRIATELY APPLY THE STATE LAW ON SUBDIVISIONS.

The heart of this case lies in the understanding and enforcement of the California Subdivision Map Act and the mandatory duties that Act levies upon local agencies vis a vis the completion of offsite public improvements.

A. The Court of Appeal Failed to Adequately Address Appellant's Primary Claim Concerning the Respondent's Willful Circumvention of the California Subdivision Map Act.

The California Subdivision Map Act expressly provides that if public improvements, required by the county as conditions to tentative map approval, have not been completed at the time of final map approval, the legislative body must require, as a condition to approval of the final map, the subdivider either to complete the improvements at the subdivider's expense or to initiate and consummate proceedings under an appropriate assessment act of the Mello-Roos Community Facilities Act of 1982 (CAL GOV'T CODE §53311-53368.3) for the financing and completion of all required improvements. (CAL GOV'T CODE § 66462).

The public improvements at issue in this case are a sewer and storm drain, created through a unit easement, designed to benefit the entirety of the Crown Hills Subdivision and neighboring properties thereto. The public nature of these improvements should be undisputed in light of the continued and unabated use, by the public, since 1990.

The Court of Appeal's misdirected its analysis away from this, the controlling issue in the case. Rather than analyzing the Appellant's assertions under the California Subdivision Map Act, the Court allowed itself to become mired in the admittedly complex details of this case. Accordingly, that Court reviewed Appellant's claim for a breach of mandatory duty only as such a duty would relate to the enforcement of certain performance bonds procured for the completion of the public improvements. This focus in misplaced. The mandatory duty exists under California subdivision law and relates directly to an agency's affirmative obligation vis a vis offsite public improvements. (CAL GOV'T CODE § 66462) The bonds were merely one mechanism by which the County, through tender, could have mitigated the damage to Appellant's interests. However, even proper tender of these bonds would not have satisfied the Respondent's obligations under the California Subdivision Map Act. Appellant suggests that the root cause for this misdirected analysis may lie in the Court's faulty interpretation of the facts of the case. (See Section C, "The Court of Appeal's Decision Grossly Mischaracterized the Facts of this Case and Predicated Their Opinion upon These Distortions in Accuracy", discussed supra.)

What was sacrificed through the lower court's failure to adequately address the applicability of state law was a thorough understanding of the steps Appellant asserts taken by the Respondent, County of San Diego, to circumvent their mandatory duties attendant to offsite public improvements under state law.

A fraudulent map, a will to conceal, and a failure to disclose material facts permitted the economic usurpation of Appellant's property and lifetime investment. The subdivision and the Respondent created a fraudulent map in 1985 to circumvent the Subdivision Map Act. They did this in order to obliterate their requirements to create or secure proper offsite public improvements for the subdivision. This fraudulent map was submitted representing a pre-existing sewer and constituted their means of solving the problem of bridging the gap between the closest existing public sewer south of Interstate 8 and the subdivision. This map represented that they would connect to an

"existing sewer line" on Appellant's property that plainly did not exist. Furthermore, representation in the title insurance associated with all 333 units of the Crown Hills subdivision represents that all offsite public improvements have been completed violates the Subdivision Lands Act as well. (CAL. BUS. & PROF. CODE § 11000-11200.)

The County repetitively failed to disclose its obligations for offsite public improvements. This failure to disclose and subsequent fraudulent concealment of the County's duties induced many of Appellant's actions taken to protect his property. Appellant's reliance upon the County was justifiable and their fraud in inducing that reliance should be actionable in a court of law. The County had sufficient knowledge that the sewer did not exist through Appellant's property. Nonetheless, they allowed the fraudulent map to be used. This action, be it taken through negligence, fraud, or sheer incompetence, constitutes clear culpability in the damage suffered to Appellant's property.

Appellant requests rehearing to settle the important question of how best to enforce the mandatory duties incumbent upon local agencies vis a vis offsite public improvements in instances where the agency has manufactured cursory compliance with state law through fraud.

B. The Court of Appeal Failed to Appropriately Apply the California Law on Delayed Accrual and Equitable Tolling.

The Court of Appeal's opinion never addressed Appellant's argument that the statute of limitations defense raised by Respondent could be satisfactorily survived through a proper application of the principles of delayed accrual and equitable tolling. Appellant therefore petitions this Court for review on these important questions of law and equity.

The general rule of damage accrual states that a cause of action accrues when the wrongful act is done and not at the time of the plaintiff's discovery. (*Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236. Curtis v. Kellogg &

Andelson (1999) 73 Cal.App4th 492, 500.) In the case at bar that accrual point would be chronologically lodged on March 10, 2001. This was the date on which Appellant lost title and ownership to his property, thereby rendering impossible and impracticable any efforts by the County to fulfill its duties under the Subdivision Map Act

The delayed accrual principle is based on the notion that statute of limitations are intended to run against those who fail to exercise reasonable care in the protection and enforcement of their rights. (*Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App3d 292, 297; *Israelsky v. Title Insurance Company of Minnesota* (1989) 212 Cal.App.3d 611, 619.) Appellant acted well within the bounds of reasonableness in attempting to secure proper completion of the subdivider improvements. However, these acts were not obligated by statute or regulation. Rather, it was the local agency, i.e. the County of San Diego, who possessed the legal duty to compel completion of the off-site improvements. California courts have long given the "plaintiff, in cases where a continuing duty has been breached, the option of filing suit when the time for complete performance has passed." (*Lambert v. Commonwealth Land Title Insurance Company* (1991) 53 Cal.3d 1072, 1078; Israelsky, supra, 212 Cal.App.3d at 617-618; 3 WITKIN, CAL.PROC., ACTIONS, §622.) That standard, when applied to the case at bar, lodges not only the dispositive date of final damage at the final time after which performance could not longer be made, i.e. the date of Appellant's loss of control and interest in the property.

Appellant contends that his claim survives a Statute of Limitations attack through careful and precise application of the California Principle of Equitable Tolling. Equitable tolling is a judge-made doctrine which operates independently of the literal wording of the Code of Civil Procedure to suspend or extend statute of limitations as necessary to ensure fundamental practicality and fairness. (*Addison v. State of California* (1978) 21 Cal.3d 313, 318-319; *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370; *Bollinger v. National Fire Insurance Co.* (1944) 25 Cal.2d 399, 411.) The application of equitable tolling doctrine requires

balancing the injustice to plaintiff occasioned by bar of his claim against effect upon important public interest or policy expressed by the limitations statute. (*Addison*, supra, 21 Cal.3d at 321.)

Were the Court to conclude that the Appellant's case is time barred, Appellant asks for relief to be found in the doctrine of equitable tolling. In balancing the interests of both parties, Appellant contends that the interests of justice weigh heavily in favour of tolling. This appeal proceeds from an order of summary judgment. Appellant was never given proper opportunity to have his case heard. It need not be the purview of this Court to rule definitively on whether or not the governmental agency in fact violated its duties under the Subdivision Map Act and corollary county ordinances. For that is not the nature of Appellant's prayer for relief. Rather Appellant asks that these statutory duties have the opportunity to be examined in a court of law and the actions of the Respondent be analyzed and adjudged accordingly.

Appellant's economic and pecuniary loss from this case is enormous and his efforts to seek legal hearing abundant. Appellant first argued this proper analysis of damage accrual placed his claim well within the Statute of Limitations. Yet, in the alternative, Appellant petitions this Court to invoke its powers under the doctrine of equitable tolling to serve the interests of justice and preserve the principle of judicial review.

It should be noted that both the Respondent's argument and the Court of Appeal's ultimate opinion, relied upon the 90 day statute of limitations period provided for in the California Subdivision Map Act for all contestation of the approval of final maps.(CAL. GOV'T CODE §66499.37) (See RB, 13-14; Ct. App. Op., 10.) However, in light of the fact that the map approval date was 1987 and Appellant had no cause to expect that the map represented a fraudulently drawn sewer across his property, dismissing his claims under such a rationale would distorts the traditional justifications for that 90 day limit. (*Hensler v. City of Glendale* (1994) 8 Cal. 4th 1.)

C. The Court of Appeal's Decision Grossly Mischaracterized the Facts of this Case and Predicated Their Opinion upon These Distortions in Accuracy.

The Court of Appeal's opinion is rife with misstatements, omissions, and mischaracterizations of material facts. Appellant itemized these errors in his Petition for Rehearing, submitted to the Fourth Appellate District, Division One, on July 28, 2005 and summarily denied on August 9, 2005. Appellant lodges this ground for review pursuant to Rule 28(c)(2) of the California Rules of Court which provides, in pertinent part,

> A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing.
> Cal. Rules of Ct.,Rule 28 (c)(2).

A brief synopsis of the most egregious mistakes follows below.

1. Court of Appeal wrongly maintained Appellant held primary responsibility for sewer and storm drain development.

The Court of Appeal opinion stated, "In February 1989 Shaw entered into an agreement for improvements with the County in which he promised to dedicate part of his land for a pubic road and to build, at his own expense, various improvements on his property, including a drainage system and a 10 inch sewer main." (Ct. App. Op., 2)

This is a clear mischaracterization of fact and misstatement of legal obligation. The only reason Appellant entered into 1989 agreement was due to the failure of the subdivision and

Respondent to comply with state law in 1986 regarding offsite public improvements. These improvements should have been completed under California Subdivision Map Act § 66462 in 1986. These improvements were in fact the easements, made mandatory by the County, which should have been previously completed in order for subdivision to be in compliance with California Subdivision Map Act requiring completion or security of offsite public improvements before final map approval.

2. Court of Appeal inaccurately dated approval of Map TM4456.

The Court of Appeal opinion stated, " The tentative map No. 4456, approved in 1984, failed to identify any offsite improvements necessary for the subdivision sewer or flood control system." (Ct. App. Op., 3)

This date referenced by the Court is inaccurate. The map approval date was 1987, not 1984. This date is material in light of the fact that the Appellant argues that the reason why this map "failed to identify any offsite improvements necessary for the subdivision sewer or flood control system" was because a fraudulent map was being used. This map was used to fraudulently convey the idea that the necessary gap to be bridged between public sewer and subdivision was only to Appellant Shaw's property and NOT to Interstate 8.

3. Court of Appeal wrongly asserted the construction of the sewer and storm drain were for the private benefit of Appellant.

The Court of Appeal opinion stated, "In 1986 Cal West and Shaw entered into a joint venture agreement which provided that the parties desired to construct a sewer and storm drain along and over Shaw's property for their mutual benefit." (Ct. App. Op., 5). This is a patent misstatement of fact. There was no mutual benefit in light of the fact that these were offsite public improvements. The sewer and storm drain were designed to benefit the entirety of the Crown Hills subdivision as well as neighboring properties. The existence of a verifiable "public use"

activates obligations under state and federal law.

These factual errors should be disturbing to the reviewing Court as they are indicative of a gross misunderstanding of the predicate for this case. Appellant maintains that these errors, pervasive as they are in the Court of Appeal opinion, support the aforementioned grounds for review before the Supreme Court.

II. REVIEW IS APPROPRIATE TO PRESERVE THE PRINCIPLE AND PRACTICE OF EMINENT DOMAIN IN INSTANCES WHERE THE ACTIONS OF A GOVERNMENTAL AGENCY AMOUNT TO A TAKING OF PRIVATE PROPERTY FOR A PUBLIC USE.

Appellant raised the issue of eminent domain in his Petition for Rehearing, asking for the Court of Appeals to exercise its discretionary authority to hear limited argument on this issue not previously addressed in the briefing by the parties. That Petition for Rehearing was denied.

Appellant argues that the 1986 agreement did not comply with Eminent Domain laws. The Fifth Amendment to the United States Constitution mandates " . . . nor shall private property be taken for public use, without just compensation." (U.S. CONST. amend. V.) According to the text of terms of the 1986 agreement, had Appellant Shaw not participated with the developer, Cal West, to build the improvements then the developer had the right to seize plans and right to build build 40 foot easement across Appellant's property for the public sewer and storm drain. This clearly constitutes a taking of private property for the purpose of public use in contradiction to state and federal constitutional law of eminent domain.

The Fifth Amendment to the United States Constitution finds its corollary in Article I, Section 19 of the the California Constitution which provides in pertinent part:

> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for,

the owner. CAL. CONST. ART. I §19

Respondent is accurate in noting that inverse condemnation liability will not lie for damage to private property allegedly caused by private development approved or authorized by public utility where public entity's sole affirmative action was issuance of permits and approval of subdivision map. (RB, 21-22; *Ullery v. Contra Costa County* (1988) 202 Cal.App.3d 562.)

However, the facts of this case implicate the mandatory duties incumbent upon the public entity, County of San Diego. These duties exceed well beyond the 'issuance of permits and approval of subdivision map'. (Ullery v. Contra Costa County, supra 202 Cal.App.3d 562.) It should also be noted, if in the circumvention of state law, an agency permits the existence and acceptance of a fraudulent map, that performance of "approval of subdivision map" ought properly be called into question itself. Respondent further mandated that Appellant grant easements for sewer and storm drain development, essentially public improvements, designed to benefit the entirity of the subdivision as well as neighboring properties thereto.

Appellant respectively requests that the Court intervene in this matter to address whether or not a governmental agency, in making mandatory upon a private property owner, the grant of easements to be used to benefit the public through the construction and maintenance of offsite public improvements for sewer and storm drainage, before the agency will grant site preparation plan approval, effectively constitutes a taking under law.

CONCLUSION

For the foregoing reasons, review should be granted in order that the decision of the Court of Appeals be reversed and this case remanded to trial.

Respectfully submitted,
DATED 17 August 2005 s: _____
WALTER M. SHAW
Appellant in Propia Persona

CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, rule 14(c)(1)

Pursuant to California Rules of Court, Rule 14(c)(1), I certify that the text of this brief consists of 5623 words as counted by the Microsoft Word 2000 word-processing program used to generate the brief.

DATED 17 August 2005

_____

Walter M. Shaw

Appellant in Propia Persona

APPENDIX F

Petition for Rehearing, State Appellate Court
(Reformatted)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

WALTER M. SHAW, Plaintiff and Appellant, v. COUNTY OF SAN DIEGO, Defendant and Respondent	4th Civil No. D043509 (San Diego Superior Court Case No. GIE 13476)

Appeal From the Superior Court of San Diego County
Honorable Lillian Y. Lim, Judge

PETITION FOR REHEARING

Walter M. Shaw
4000 Palm Drive
Bonita, CA 91902-2520
(619) 472 - 1555
Appellant in Propia Persona

Walter M. Shaw
4000 Palm Drive
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Self-represented

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

WALTER M. SHAW, Plaintiff and Appellant, v. COUNTY OF SAN DIEGO, Defendant and Respondent	4th Civil No. D043509 (San Diego Superior Court Case No. GIE 13476)

PETITION FOR REHEARING

Appellant, WALTER M. SHAW, seeks rehearing of the court's opinion in the above case filed on 15 July 2005. Appellant's petition for rehearing is based upon the following four substantive grounds:

1) Material Misstatements of Fact in Court's Opinion
2) Incomplete Application of Standard of Review for an Appeal from Summary Judgement

3) Failure to Address Appellant's Central Substantive Argument for Reversal

4) Petition of the Court to Execute Discretionary Authority to Approve Rehearing for Argument on the Issue of Eminent Domain

ARGUMENT

Pursuant to Rule 25(a) of the California Rules of Court, a party is afforded an opportunity to petition for rehearing in the event of a court's decision disadvantageous to his appeal. Appellant seeks rehearing based upon the above mentioned four grounds.

Ground #1:
Material Misstatements of Fact in the Court's Opinion

Central to the Court's final analysis was a recitation of facts. These facts included significant omissions and material errors detailed below.

-1- "Shaw purchased unimproved land in Alpine, California for eventual commercial or industrial development" (FINAL OPINION, 2:1)
Misstatement of Fact. No definite identifiable improvement was ever planned on the property.

-2- "Both landowners began development efforts in the mid-1980s". (FINAL OPINION, 2:4)
Misstatement of Fact. Subdivision Cal-West began work on TM4456 in 1983-1984 whereas Appellant Shaw began site preparation plans in 1986.

-3- "In 1986 Shaw [illegible] to make his raw land suitable for dev[illegible]pment by applying for a grading and bu[illegible]ing permit from the County." (FINAL OPINION, 2:5)
Untrue Statement. No permit applied for in 1986. In 1986, Appellant submitted a site preparation plan which is substantively different from a "grading and building permit". Reference

to a "grading and building permit" supports earlier inaccurate statements (see -1- supra) regarding Appellant's supposed commercial and industrial development plans.

-4- "Consequently in February 1989 Shaw entered into an agreement for improvements with the County in which he promised to dedicate part of his land for a pubic road and to build, at his own expense, various improvements on his property, including a drainage system and a 10 inch sewer main." (FINAL OPINION, 2:11)
Mischaracterization of Fact. Misstatement of Legal Obligation. The only reason Appellant entered into 1989 agreement was due to the failure of the subdivision and Respondent to comply with state law in 1986 regarding offsite public improvements. These improvements should have been completed under California Subdivision Map Act § 66462 in 1986.

-5- "The County informed Shaw that he would not be responsible for maintenance or repair of the improvements because, upon completion, the County would accept dedication." (FINAL OPINION, 2:14)
Mischaracterization of Fact. These improvements were in fact the easements, made mandatory by the County, which should have been previously completed in order for subdivision to be in compliance with California Subdivision Map Act requiring completion or security of offsite public improvements before final map approval.

-6- " The tentative map No. 4456, approved in 1984, failed to identify any offsite improvements necessary for the subdivision sewer or flood control system."

(FINAL OPINION, 3:1)
Error in fact. This date referenced by the Court is inaccurate. The map approval date was 1987, not 1984. This date is material in light of the fact that the Appellant argues that the reason why this map "failed to identify any offsite improvements necessary for the subdivision sewer or flood control system" was because a fraudulent map was being used. This map was used to fraudulently convey the idea that the necessary gap to be bridged between public sewer and subdivision was only to Appellant Shaw's property and NOT to Interstate 8.

-7- "In 1986 Cal West and Shaw entered into a joint venture agreement which provided that the parties desired to construct a sewer and storm drain along and over Shaw's property for their mutual benefit." (FINAL OPINION, 3:5)
Misstatement of Fact. There was no mutual benefit in light of the fact that these were offsite public improvements. The sewer and storm drain were designed to benefit the entirety of the Crown Hills subdivision as well as neighboring properties. The existence of a verifiable "public use" activates obligations under state and federal law.
The 1986 agreement did not comply with the Subdivision Map Act because it did not represent security that the offsite public improvements would be built. According to CA law such financial security must be provided. In addition there was never any attempt to make legally operative the 1986 agreement.
The 1986 agreement also did not comply with Eminent Domain laws. (See Ground #4 infra) If Appellant Shaw did not participate with the developer, Cal West, to build the improvements then the developer had the right to seize plans

and right to build build 40 foot easement across Appellant's property for the public sewer and storm drain. This clearly constitutes a taking of private property for the purpose of public use in contradiction to federal constitutional law of eminent domain.

-8- "The final map No. 4456-1 approved by the County's Board of Supervisors reflected a sewer line crossing Shaw's property." (FINAL OPINION, 3:8)
Mischaracterization of Fact. No sewer line existed across Appellant's property and final map was fraudulent on its face. Respondent willfully circumvented its legal obligations under SMA. (CAL. GOV'T CODE §66410-66499.58) This patently erroneous map was used to fraudulently convey the idea that the necessary gap to be bridged between public sewer and subdivision was only to Appellant Shaw's property and NOT to Interstate 8.

-9- "Dyke and Cal-West performed the agreed-upon work on Shaw's property. However, the grading and improvements planned for Shaw's property were never satisfactorily completed and the County refused to approve the work." (FINAL OPINION, 3:19)
Contradictory Statements. Incongruity in the factual presentation by the Court. The work was either "never satisfactorily completed" or sufficiently "performed" but clearly cannot be both.

-10 - "Because the work was not approved, the County refused to accept dedication of the improvements."(FINAL OPINION, 3:21)
Omission of Material Fact. Even without dedication, the public sewer has been in

continual use since 1990. As a unit easement was granted for the public sewer and storm drain, the dedication of one cannot take place without dedication of the other.

-11- "In February 1995 Shaw sued Dyke, alleging the grading performed by Dyke was not properly performed." (FINAL OPINION, 4:1) Omission of Fact. The County declared the grading completed in 2004.

-12- "In 2000, Shaw sought to have the County arrange for completion of the drainage and grading improvements on his land, either by enforcing the Bonds against Cal-West or by dedicating the storm drain and sewer line to public use. The County did not enforce the Bonds nor did it accept dedication of the storm drain and sewer line." (FINAL OPINION, 4:7) Mischaracterization of Facts. The public use of the sewer and storm drain had been established in 1986 by the grant of the unit easement. As a unit easement, dedication of one could not occur without dedication of the other. The public use of the sewer and storm drain has continued unabated since 1990. Appellant never requested dedication for public use. Appellant merely attempted to convince Respondent to enforce the Performance Bond. The requirements of CA Subdivision Map Act exist up until the time of full compliance. The performance bond was merely one mechanism by which these requirements could have been partially met.

-13- "Unable to sell the property or obtain financing, Shaw transferred the property to Dyke by grant deed on January 12, 2001, as required by the agreement with Dyke." (FINAL OPINION, 4:14) Misstatement of Fact. Property remained in

Appellant's control until March 2001. Appellant had purchased an "irrevocable option to repurchase" at the substantial economic value of $25,000 which served to extend date of transferal two months.

-14- "All four causes of action in Shaw's first amended complaint were based on the County's failure to enforce the Bonds to secure completion of the improvements on Shaw's property." (FINAL OPINION, 5:2)
Misstatement of Fact. Shaw's first amended complaint was predicated on the County's failure to comply with California law, specifically the Subdivision Map Act, which provided, in part, a mandatory duty on behalf of the subdivision and local agency to either compel completion of the offsite public improvement or arrange for the financial security thereto. The so-called "improvements" on Appellant's property were neither conceived nor created for the benefit of Appellant. Rather these improvements served solely a public purpose and as such activated the legal obligations on behalf of Respondent. The "Bonds" were merely one mechanism through which the County, while still not in full compliance with the SMA, could have mitigated the damage to Appellant's property and lifetime investment.

Ground #2
Incomplete Application of Standard of Review for an Appeal from Summary Judgement

The Appellate Court failed to apply appropriately the de novo standard of review. In citing from Saelzler v. Advanced Group 400, the Court postulated, "we strictly construe the papers of the moving party and liberally construe those of the

opposing party, resolving any evidentiary doubts or ambiguities in favour of the party opposing the motion." (FINAL OPINION, 6:9; Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 768.)

While this accurately states the principle of legal analysis for a motion for summary judgment, it does not sufficiently address the issue of an appellate court's review of that grant of summary judgement. Appellant directs the Court back to the very language in Saelzer which provides that the Court

> must determine whether defendants in the present case have shown, through the evidence adduced in this case . . . that [the plaintiff] Saelzler has not established, and cannot reasonably expect to establish, a prima facie case of causation, a showing that would forecast the inevitability of a nonsuit in defendants' favor. If so, then under such circumstances the trial court was well justified in awarding summary judgment to avoid a useless trial. *Saelzler v. Advanced Group 400*, supra, 25 Cal.4th 763, 769.

The Court continues, "In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party, liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107; *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514; *Kaplan v. LaBarbera* (1997) 58 Cal.App.4th 175, 179)."

Here, this Court, in upholding the Trial Court's grant of summary judgment, failed to view the evidence in the light most favorable to Appellant. In particular, the Court failed to even address the Appellant's claim of delayed accrual which would materially affect the Respondent's primary defense of a statute of limitations bar to Appellant's original claims. (See Ground #3 discussed supra.)

Ground #3

Failure to Address Appellant's Central Substantive Argument for Reversal

First, the grant of summary judgment from the trial court was predicated upon a statute of limitations procedural bar to the Plaintiff's claims. In appealing this grant of summary judgement, Appellant focused his argument upon the recognized jurisprudence of delayed accrual and equitable tolling. However, the Court's opinion failed to address this key argument and in so doing deprived the Appellant of his constitutional right to fair and full judicial review.

Second, the Court reviewed Appellant's claim for a breach of mandatory duty as such a duty would relate to the enforcement of certain performance bonds procured for the completion of the public improvements. This focus in misplaced. The mandatory duty exists under California subdivision law and relates directly to an agency's affirmative obligation vis a vis offsite public improvements. The bonds were merely one mechanism by which the County, through tender, could have mitigated the damage to Appellant's interests. However, even proper tender of these bonds would not have satisfied the Respondent's obligations under the California Subdivision Map Act. (CAL. GOV'T CODE §66462) It should also be noted that substantive violations of the California Subdivision Map Act, such as those alleged by the Appellant in this case, do amount to a criminal offense punishable by up to one year incarceration or a $10,000 fine or both. (CAL. GOV'T CODE §66499.31)

Appellant respectfully requests rehearing in order to ensure that the Court's decision, irrespective of prevailing party, be predicated upon a proper review of the applicable law. To so

severely misconstrue the Appellant's original claim and so substantially disregard his substantive argument on appeal distorts the very premise of sound appellate review.

Ground #4

Petition of the Court to Execute Discretionary Authority to Approve Rehearing for Argument on the Issue of Eminent Domain

Appellant appreciates the underlying policies for judicial economy and case resolution that are served through final disposition of a case or controversy. However, Appellant employs this petition for rehearing to insure that the grounds upon which such final disposition are based do accurately and adequately address the material facts and argued law presented to the Court. This concern underlies the above argued three grounds for rehearing.

Lastly, Appellant appeals to the Court for review upon a final issue not previously briefed before this Court. This is the issue of Eminent Domain. Appellant argues that the 1986 agreement did not comply with Eminent Domain laws. The Fifth Amendment to the United States Constitution mandates " . . . nor shall private property be taken for public use, without just compensation." (U.S. CONST. amend. V.) According to the text of terms of the 1986 agreement, had Appellant Shaw not participated with the developer, Cal West, to build the improvements then the developer had the right to seize plans and right to build build 40 foot easement across Appellant's property for the public sewer and storm drain. This clearly constitutes a taking of private property for the purpose of public use in contradiction to federal constitutional law of eminent domain. Appellant appeals to Court to exercise its discretionary authority to hear the merits of this argument upon rehearing and provide for a limited briefing on this issue alone by respective parties.

CONCLUSION

Petitioner respectfully requests that rehearing be granted and that the Court reverse the judgment.

DATED: 28 July 2005 s: _____

Walter M. Shaw

(2)

Supreme Court, U.S.
FILED
MAY 12 2006
OFFICE OF THE CLERK

05-1002

No.

In The

Supreme Court of the United States

Walter M. Shaw,

Petitioner

versus

County of San Diego,

Respondent

On Petition For Rehearing
of a Petition for Writ of Certiorari
To The Court of Appeal of the The State of California
Fourth Appellate District, Division One

PETITION for REHEARING

Walter M. Shaw
Petitioner In Propia Persona
4000 Palm Drive
Bonita, California, 91902
{619} 472 -1555

REASONS FOR GRANTING THE REHEARING

INTRODUCTION

Petitioner will present to the Court, in the following petition for rehearing, the initiating factor for this legal claim which lies in the creation and acceptance of a 1985 Map (*See Appendix A, 1985 County of San Diego Recorder's Office Map*) that represented by the Subdividers and approved by the Respondent that a pre-existing sewer existed on Petitioner's property. This is and was a fraudulent representation. This map remains on legal record in the County of San Diego Recorder's Office and was the primary means by which the Respondent circumvented its obligations under federal and state law. Respondent neglected affirmative legal responsibility pursuant to eminent domain takings jurisprudence in instances in which a land use regulation is asserted, acquired, and unjustly deprived compensation. Respondent evaded mandatory state law pursuant to the California Subdivision Map Act requiring completion or security for off-site public improvements before TM approval by the Board of Supervisors in 1987. Respondent ignored state real estate code pursuant to the California Subdivision Lands Law requiring the certification that offsite improvements were completed prior to the issuance of valid title insurance.

Rule 44 of the Rules of the Supreme Court makes clear that rehearing from a denial of a petition for writ of certiorari shall only be granted in instances in which "intervening circumstances of a substantial or controlling effect" exist or to "other substantial grounds not previously presented." (Rule 44.2, Rules of the Supreme Court).

I. NEW FACTUAL DEVELOPMENTS SUPPORTING THE PUBLIC STATUS OF PROPERTY IMPROVEMENTS INTEGRAL TO THIS LITIGATION ESTABLISH THE REQUISITE INTERVENING CIRCUMSTANCES

OF A SUBSTANTIAL EFFECT TO WARRANT REHEARING.

Petitioner submits this Petition for Rehearing in order to bring to light such facts not previously known to the Court. The initial misrepresentation integral to this prolonged legal struggle can be found in the original opinion issued by the Superior Court of the State of California. In granting the Respondent's motion for summary judgement, that state court made clear in its opinion that the sewer and storm drain which formed the factual predicate for the Petitioner's case were not to be considered public improvements. In so deciding, the state court was able to comfortably disregard prevailing state law. Petitioner had argued that the legal obligations incumbent upon the County of San Diego pursuant to the California Subdivision Map Act had been willfully circumvented by the use of the 1985 fraudulent map (*See **Appendix A**, 1985 County fo San Diego Recorder's Office Map*) which falsely represented a pre-existing sewer on subject property.

The California Subdivision Map Act expressly provides that if public improvements, required by the county as conditions to tentative map approval, have not been completed at the time of final map approval, the legislative body must require, as a condition to approval of the final map, the subdivider either to complete the improvements at the subdivider's expense or acquire adequate security for improvements. If, after 120 days, the above actions have not been taken by the County, it must initiate and consummate proceedings under an appropriate assessment act of the Mello-Roos Community Facilities Act of 1982 (CAL GOV'T CODE §53311-53368.3) for the financing and completion of all required improvements. (CAL GOV'T CODE § 66462).

The public improvements at issue in this case are a sewer and storm drain, created through a unit easement, designed to benefit the entirety of the Crown Hills Subdivision and neighboring properties thereto. It should be made clear that

the sewer and storm drain represented a "unit easement" of 40 feet by 600 feet. Unit easement classification carries legal and practical repercussions in the creation, maintenance, and ownership of the improvements. Action taken by the Respondent toward one half of a unit easement will imply and in fact, must represent, the identical action taken toward the other half of the easement. A unit easement, once created, cannot be severed under law. This classification as a unit easement was a condition wholly created by the Respondent.

Respondent had argued and the state court had erroneously agreed that the because "County did not construct, accept, or maintain any improvement on the property, Shaw could not establish a public use." (RB 22, Respondent's Brief submitted to the Court of Appeals, State of California, Fourth Appellate District) . This argument was a reversal from the decision made in 1986 when the public easements for sewer and storm drain were mandated by the County before Petitioner could secure approval for a site preparation plan for whatever improvements he decided to build upon the property. The Maintenance Map of the Alpine Sanitation District for the County of San Diego (*See **Appendix B**, County of San Diego Alpine Sanitation District Maintenance Map*) clearly shows that the sewer is and has been maintained by the County of San Diego since the mid 1990s. Since the sewer is part of a unit easement, therefore, the County is also accountable for the maintenance of the corollary storm drain as well. It was and is the San Diego Flood Control and Alpine Sanitation District Policy that respective annexation to each district would not take place one without the other because of their unit easement designation.

Thus, the sewer, repeatedly argued by the County and blindly assumed by the lower Court to be a private improvement, is now admittedly the sole responsibility of a public governmental agency, the Alpine Sanitation District. The County of San Diego continually argued that it held no mandatory obligation pursuant to the California Subdivision

Map Act because the sewer and storm drain were not public improvements. In so characterizing the sewer and storm drain as private improvements, the County was able to insulate itself from state law. However, as the facts now show, the County is responsible for the maintenance and upkeep of the sewer and storm drain. This information becomes even more inculpatory when coupled with the fact that the County of San Diego created a fraudulent map that showed one half of the public improvement unit easement, the sewer, as pre-existing on Petitioner's property. Not only did the Respondent willfully deny the public nature of these improvements, it also illegally misled county officials, Crown Hills landowners, and court justices into believing that the public sewer across Petitioner's property created in 1989 actually existed as a private pre-existing sewer line. The motivations behind this act of willful circumvention of state law remain open to conjecture: a desire to avoid a financial obligation to create and maintain offsite public improvements of subdivisions, an opportunistic attempt to gain an economic windfall from a privately financed public improvement, or an example of governmental negligence borne from a pattern of institutional incompetence within the agency itself. Whatever the reason, the result remained the same. A private landowner was forced to personally finance a now admitted public improvement.

This factual development becomes even more important when one is reminded of the ultimate effects of the case. Petitioner inevitably lost his right to the property under which the public improvements ran.

Petitioner's original Petition argued extensively that the federal constitutional principles of eminent domain had been not only grossly mis-served but also plainly ignored by the Respondent County of San Diego. The refrain of the Respondent has long echoed in an argument that the fiscal and legal responsibility for the sewer and storm drain lie at the feet of the private landowner. Respondent has implemented this argument to evade its legal obligations under the California

Subdivision Map Act, state procedural law, federal common law, and ultimately Constitutional Takings law. Petitioner asks this Court to re-evaluate its denial of petition for writ of certiorari in light of the evidence now attesting, irrefutably, to the County of San Diego's primary responsibility for the maintenance of the sewer, an admittedly public improvement, and continuing requirement to do the same for storm drain, the latter to control the directed flow from the 333 Crown Hills of water created and falling from the subdivision which all eventually required to traverse Petitioner's property as the lowest site north of I-8.

The California Subdivision Map Act and the constitutional precepts of eminent domain both operate to secure the rights of the private petitioner in instances in which the interests of state exert, at a bare minimum, mere influence over, or at a maximum, assumed ownership of, the property rights of the landowner. The legal theory and practical reality of these laws are clearly to prevent the government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole. (*Armstrong v. United States*, 364 U.S. 40, 49 (1959); *Eastern Enterprises v. Apfel*, 118 S.Ct 2131 (1998); *Bello v. ABA Energy Corp.*, 124 Cal.App.4th 301 (2004)). This inequitable distribution of burdens underlies the factual history and legal background of this case. The economic realities of this inequity are staggering. Much of Petitioner's previous legal arguments have centered around the prevailing legal principles that, in many ways, trump the personal and pecuniary loss of his own property. But what for the financial gain realized at the expense of the Law?

The Crown Hills subdivision contains 333 units, each with an original asking price of roughly $175,000. Without a functioning sewer and storm drain, these properties would be unmarketable. However, in manufacturing an existing sewer line under Petitioner's property, Respondent was able to bridge the gap between the Crown Hills subdivision and not only the

closest existing public sewer south of Interstate 8 but also the *only* possible site for a gravity sewer. Without the sewer fraudulently represented under Petitioner's property in 1985, personally financed by Petitioner by mandatory easements levied by the Respondent in 1986, and secretly maintained by the Respondent since the mid 1990s, the Crown Hills Subdivision and its 333 units would likely not exist. Had the subdivision itself been saddled with the economic burden of securing this sewer and storm drain, it likely would have aborted the financial agreement to build the property in that location. The Crown Hills Subdivision and its 333 units, thanks in large part to the real estate explosion in San Diego, now hold an asking price between $550,000 and $650,000 per each home. The economic windfall realized by the County of San Diego in property taxes alone on these units supplies ample economic motive for the circumvention of state and federal law. Moreover, current state records now show the Respondent has assumed ownership of a portion of Petitioner's land at question in this litigation. *(See **Appendix C**, Map Representing Parcel Ownership and **Appendix D**, County of San Diego Recorder's Office Parcel Ownership Detail for Plot Number 403-380-83-00)*.

II. FUNDAMENTAL ERRORS IN THE TITLE INSURANCE OF PROPERTY ASSOCIATED WITH THIS LITIGATION CONSTITUTE A SUBSTANTIAL GROUND NOT PREVIOUSLY PRESENTED TO WARRANT REHEARING.

Under the Subdivision Lands Law, a subdivision exists when improved or unimproved land is divided for the purpose of sale, lease or financing (whether immediate or future) into five or more parcels. The Subdivision Lands Law was designed to protect purchasers from misrepresentation, deceit, and fraud in subdivision sales and makes it illegal to commence sale of subdivision lots until the Real Estate Commissioner determines

that the offering meets certain affirmative standards and issues a public report. In addition, the Real Estate Commissioner must insure that the subdivider discloses in the public report pertinent facts about the property and the terms of the offering. The title insurance attendant to subdivision properties mandates that all offsite improvements have been completed. Without this guarantee or comparable provision for the completion of offsite improvements, the title insurance of a given subdivision property or properties will be prima facie invalid.

The title insurance secured for the Crown Hills subdivision in the mid 1990s erroneously maintained that offsite improvements were completed. The sewer and storm drain necessary for proper sanitation throughout the subdivision were misrepresented as complete thereby rendering the title insurance on each of the 333 units, as well as any subsequent properties utilizing these public improvements, invalid. To this day the title insurance is false thus jeopardizing home owners of the 333 housing units.

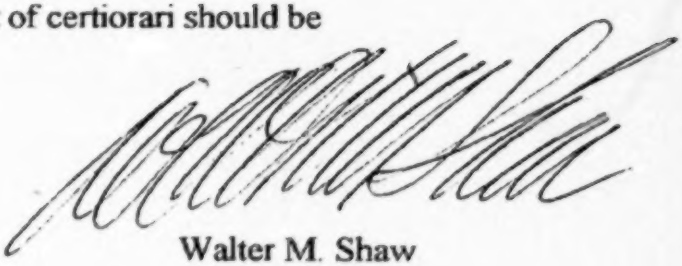
Petitioner directs the Court's attention to this development in light of the added impetus it adds for the Respondent to materially misrepresent its obligations under state and federal law. Were the Respondent to have exercised proper eminent domain proceedings over Petitioner's land in order to facilitate completion of the requisite public sewer and storm drain, it would have acknowledged de facto that the 1985 map was fraudulent, that the 1986 mandatory easements were illegal, and that the improvements themselves were admittedly public. This responsibility, onerous and embarrassing as it may have been, was nonetheless mandated by law.

This case stemmed from a grant of summary judgment that was predicated upon a misrepresentation of facts by the Respondent. Petitioner has argued in his original Petition and here again asserts on Rehearing that to prevent a claimant from an open and frank presentation of his case solely because a governmental agency has misrepresented its facts and manufactured its compliance with the law rebukes every notion

of procedural due process and substantive jurisprudential justice imaginable. Petitioner prays for this Court's clear understanding of an admittedly complex case and asks for the favour of its judgment in permitting this case, too long kept silent, to be heard.

CONCLUSION

he petition for rehearing on a writ of certiorari should be
anted.



6 May 2006

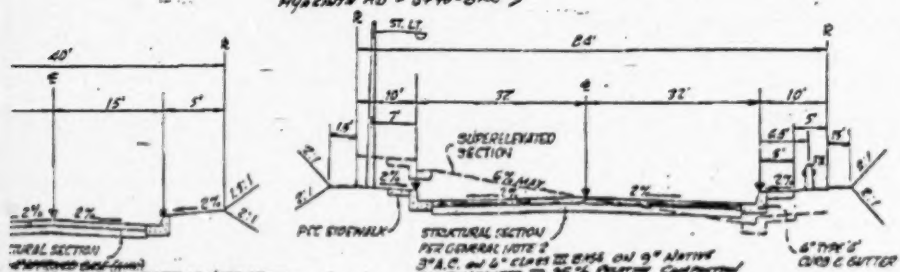
Walter M. Shaw

D. 4456-1

STRUCTURAL SECTION - PRIVATE STREET (CONTINUED)

COLUMBINE DR - 0+00 - 9+68
WILD IRIS - 0+00 - 1+90
SNAPDRAGON LN - 1+73 - 3+87
LARKSPUR DR - 6+28 - 8+61
HYACINTH RD - 3+40 - 8+00

2.5" A.C. OVER 12" NATIVE D.F. BASE COMPACTED TO 95% RELATIVE COMPACTION.



TURAL SECTION
AY 12" NATIVE O.B. EXCEPT AS NOTED ABOVE
ITH 6" BASE COMPACTED TO 95% RELATIVE COMPACTION
SECTION - PRIVATE STREETS

TYPICAL SECTION - VICTORIA PARK TERRACE

▼ ELEVATION SHOWN IN PROFILE

ATION SHOWN IN PROFILE
OP OF CURB ELEVATION AT ANY
ON IS THE CENTERLINE ELEVATION

LEGEND TO KEY MAP

SUBDIVISION BOUNDARY	
LOT NUMBER	192
BLOCK NUMBER	2000
PROPOSED WATER MAIN	
PROPOSED SEWER MAIN	
PROPOSED FIRE HYDRANT	
STREET NAME SIGN	
DIRECTION OF DRAINAGE	
EXISTING WATER MAIN	
EXISTING SEWER MAIN	
EXISTING FIRE HYDRANT	
SHEET NUMBERS	(15)
EASEMENTS	

EXISTING 30' PRIVATE ROAD EASEMENT GRANTED TO H.H. KALAGIAN, FILE 111640 REC. 9-31-1960 (UNIMPROVED)

OPEN SPACE LOT 335

PM 2338
PM 2356
PM 2034
PM 3035

(UNUSABLE PRIVATE LANE)

COLUMBINE ROAD

LOBELIA ROAD

LOT 342

LOT 343

OPEN SPACE LOT 335

NORMALLY CLOSED VALVE

CONNECT TO EXIST 8"RC

VICTORIA PARK TERRACE

EXIST. 8" RCP

REMOVE & REPLACE 118'± OF EXIST 8" RCP

SNAPDRAGON LANE

OPEN SPACE LOT 343

ENGINEER OF WORK

HAY ENGINEERING & SURVEYING, INC.
772 EAST WASHINGTON AVE.
EL CAJON, CALIF. 92021
PHONE: [illegible] 6299

PRIVATE CONTRACT

SHEET 39	COUNTY OF SAN DIEGO DEPARTMENT OF PUBLIC WORKS	42 SHEETS

PLANS FOR THE IMPROVEMENT OF TAVERN ROAD, VICTORIA PARK TERRACE, HYACINTH ROAD, VERBENA TERRACE, GENTIAN WAY, SNAPDRAGON LANE, COLUMBINE DRIVE, COLUMBINE ROAD, LOBELIA WAY, LARKSPUR DRIVE & WILD IRIS ROAD IN COUNTY OF SAN DIEGO TRACT 4456-1

CALIFORNIA COORDINATE INDEX: 245-1833 (5)

[signature]	[signature] FOR S.W. MCKENZIE, DIRECTOR OF PUBLIC WORKS
[signature]	TM 4456-1

ERMITS
NONE
P84-023
L-0821
CH MARK
'SE
ALG. ALPINE RIVER FR.
AVERN ROAD
OF SAN DIEGO
DATUM M.S.L.

NEW ENGINEER OF WORK
BATES ENGINEERING
PO BOX 2004
LA MESA, CALIF. 92044-0180
(619) 460-6985

3-16-93
Date

FILE NO. 8401
PC 1890

ENGINEER'S NAME: HAY ENGINEERING & SURVEYING, INC. — BAIRD ENGINEERING — DEVLIN ENGINEERING
PHONE NO. 440-6299 — 440-6080 — 436-0382

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4 3 2 1

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